DECLARATION OF DR. RANDELL L. MILLS

I, Randell L. Mills, declare and state as follows:

I am the founder and CEO of BlackLight Power, Inc., located at 493 Old Trenton Road,

Cranbury, New Jersey 08512.

I majored in chemistry and received my bachelor of arts degree, summa cum laude and 2.

Phi Beta Kappa, from Franklin & Marshall College in 1982. I received a medical degree from Harvard

Medical School in 1986. While attending Harvard Medical School, I concurrently spent a year taking

courses in advanced electrical engineering at the Massachusetts Institute of Technology. I have also had

significant academic training in biology, chemistry, mathematics and physics.

3. I began my research in the field of energy technology over ten years ago. I have

authored, co-authored or collaborated on numerous publications, reports and presentations at scientific

meetings in the field of energy technology and novel hydrogen chemistry, as shown in the attachment

hereto.

4. I am fully qualified to conduct the research that led to the discovery and development of

BlackLight's lower-energy hydrogen technology.

5. I personally conducted and/or supervised the experimental data disclosed in the articles

submitted to the U.S. Patent and Trademark Office ("PTO"), which are described in the attached list. The

coauthors, if any, assisted me in preparing the data.

I declare further that all statements made herein of my own knowledge are true and that

all statements made on information and belief are believed to be true; and further that these statements

were made with the knowledge that willful false statements and the like so made are punishable by fine or

imprisonment, or both, under Section 1001 of Title 18 of the United States Code and that such willful false

statements may jeopardize the validity of the application or any patent issuing thereon.

By ______ Dr. Randell L. Mills

Date: 12/8/03

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December 21, 2001

VIA HAND DELIVERY

The Honorable James E. Rogan Director, U.S. Patent and Trademark Office Washington, D.C. 20231

Re: Patent Applications of BlackLight Power, Inc.

Dear Director Rogan:

I am writing to draw your attention to a matter involving the U.S. Patent and Trademark Office (PTO) that calls into question the professionalism, competence, and integrity of the PTO. As a former appointee (Reagan Administration, Assistant Secretary of Energy), technologist (nuclear engineering), and businessman (CEO and Chairman of several major US corporations over the past 15 years), I am heartened that you have finally taken up leadership of the PTO in the G.W. Bush Administration, and are in a position to reverse the sloth and abuses under the previous Administration. I have followed your public service career over the years, particularly your last term in the House, and am convinced that the President's choice to reform this critical agency could not have been more astute.

The matter that I invite your attention to involves the prosecution of a number of U.S. patent applications submitted by BlackLight Power, Inc., on whose Board of Directors I serve. My reasons for appealing to you in this matter are motivated not only by my fiduciary duty to protect BlackLight's best interests, but also by a sincere desire to assist you in avoiding unnecessary embarrassment this situation is sure to cause the Patent Office if left unresolved. We would be most pleased to personally meet with you and principles for the parties to see if together we can bring some closure to this matter in a way that is mutually acceptable to both sides.

Through your initial PTO briefing on important pending matters, you may be aware by now that five allowed applications relating to novel chemical compounds invented by BlackLight President and CEO, Dr. Randell L. Mills, were withdrawn from issue under extremely suspicious circumstances. That withdrawal led to a lawsuit that we filed in the D.C. District Court against Director Dickinson, which case was fully briefed and argued to the U.S. Court of Appeals for the Federal Circuit before a packed courtroom. The purpose of my letter is not to debate the legal issues in that case, as we are quite confident in our position based on the record presented to the Federal Circuit during oral argument. Rather, my aim is simply to make you aware of matters that PTO officials might have omitted from your initial briefing, including the prior administration's violation of well-established patent laws, rules, and procedures in prosecuting these and other BlackLight patent applications.

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To be sure, BlackLight fully expected that, like any pioneering technology, its novel hydrogen chemistry would be carefully scrutinized by the Patent Office during the application process. Indeed, the two highly-qualified Examiners originally assigned to review BlackLight's applications. Wayne Langel and Stephen Kalafut, conducted a thorough examination, initially questioning the operability of the disclosed technology on several grounds. Upon critical review of BlackLight's supporting scientific evidence, however, the Examiners issued U.S. Patent No. 6.024,935 ("the '935 patent") drawn to an energy cell and allowed the five other chemical compound applications that were subsequently withdrawn from issue.

Examiners Langel and Kalafut displayed the utmost professionalism and courtesy in prosecuting BlackLight's applications and we certainly commend them for their actions. Unfortunately, the same cannot be said for others whose actions in withdrawing and subsequently prosecuting these and other cases have undermined the U.S. patent system to the detriment of all patent applicants. I offer the following examples for your consideration as possible topics for future discussion:

(1) Undercutting the statutory presumption of validity under 35 U.S.C. § 282

Underlying this 50-year-old statute is the premise of administrative regularity, which presumes that well-trained examiners with expertise in their respective fields will properly carry out their examination duties by issuing only valid patents. This presumption was, in fact, confirmed by the capable work Examiners Langel and Kalafut performed in examining and issuing BlackLight's '935 patent. Nonetheless, PTO Associate Solicitor Kevin Baer, for some explained reason, attacked BlackLight by denigrating the entire patent system, including its examining corps, by stating in open court:

"[P]atent examiners do review [patent applications]. Unfortunately, patent examiners are swamped and sometimes things slip through."

"[E]xaminers are under tremendous pressure to produce work, and if they're going to approve [an application], they just approve it and kind of let it out the door."

Solicitor Baer's statements on behalf of the PTO should be alarming to just about everyone—with the possible exception of accused patent infringers—and most certainly do not reflect well on the agency. Part of our purpose in seeking a meeting is to make you aware of these and other outlandish statements and to give the PTO the opportunity to issue an appropriate public retraction.

(2) Disparagement of U.S. patents in violation of MPEP § 1701

According to this well-established PTO procedural guideline, "[p]ublic policy demands that every employee of the [Patent Office] refuse to express to any person any opinion as to the validity or invalidity of . . . any U.S. patent" With the exception of exclusions that do not

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apply, "[t]he question of validity or invalidity is otherwise exclusively a matter to be determined by a court. Members of the patent examining corps are cautioned to be especially wary of any inquiry from any person outside the [Patent Office], including an employee of another Government agency, the answer to which might indicate that a particular patent should not have issued." The PTO clearly violated this admonition when it publicly disparaged the '935 patent on the record.

In yet another blatant violation of these PTO rules, Solicitor John Whealan responded to a reporter's inquiry by stating unequivocally for a soon-to-be published article that "the PTO issued BlackLight's '935 patent by mistake."

Once again, we wish to meet with you to discuss the PTO's retraction of these statements. More importantly, however, we seek an honest explanation why the PTO has singled out BlackLight for such disparate treatment and what can be done to put an end to it.

(3) PTO involvement with competitors of applicants in denying patent rights

Naturally concerned over who and what precipitated withdrawal of BlackLight's allowed applications from issue, we became suspicious that it might have been caused by competitors interfering with our valuable patent rights. Our suspicions heightened when we learned that Dr. Peter Zimmerman, former Chief Scientist for the State Department, had published an Abstract of an upcoming speech to the American Physical Society (APS), a BlackLight competitor, boasting that his Department and the Patent Office "have fought back with success" against BlackLight. In conversations with BlackLight's counsel, Dr. Zimmerman admitted that he received information concerning BlackLight's applications through e-mails from Dr. Robert Park, spokesman for the APS, who told him of a contact in the PTO referred to by Dr. Park as "Deep Throat."

If true, these actions would clearly violate the PTO's duty to maintain confidentiality of U.S. patent applications under 35 U.S.C. § 122, 18 U.S.C. § 2071, 37 C.F.R. § 1.14, and M.P.E.P. § 101, as well as raise other obvious concerns. We brought this information to the PTO's attention more than a year ago, but have yet to receive a response.

We would like to meet with you to discuss PTO investigations into this matter and the extent to which any breach of confidentiality may have occurred.

(4) Improperly creating new opposition procedures against the issuance of patents

Following withdrawal of BlackLight's applications from issue, counsel immediately began investigating the facts and circumstances surrounding that incident by questioning various PTO personnel. During that investigation, Director Esther Kepplinger admitted to counsel that she withdrew the applications in reaction to perceived heat—a "firestorm" as she put it—the Patent Office had received from an undisclosed outside source. Director Kepplinger further indicated that the withdrawal occurred only after the '935 patent had been brought to the

Director James E. Rogan December 21, 2001 Page 4 of 5

attention of Director Dickinson by Gregory Arahorian, another PTO outsider well known for his public attacks on issued U.S. patents.

These events, which, in effect, created an entirely new, non-regulatory procedure for opposing the issuance of patents, are disturbing to say the least. In light of these circumstances, we firmly believe that we are entitled to a full accounting of how, out of the thousands of patents the PTO issues on a weekly basis, our '935 patent happened to come to its attention, thus leading to the withdrawal of other allowed applications.

Unfortunately, the PTO has been less than forthcoming in dealing with this matter as succinctly expressed by Solicitor Baer to District Court Judge Emmet G. Sullivan in the following comments: "I would even say. Your Honor, you could imagine in our head any scenario of how we learned about it. A blimp flying over us. It doesn't matter, because what matters, Your Honor, is the decision [to withdraw] itself." Apparently Judge Sullivan was unimpressed by those comments, noting in footnote 10 of his opinion his being "troubled by several steps in the PTO's process" and advising the PTO to "examine its patent issuance process so that their normal operations are not compromised by such seemingly suspicious procedures."

That worthwhile goal can only be fully achieved by a complete accounting of the events in question, which we hope will be among the topics discussed at an upcoming meeting.

(5) Withholding vital information concerning the examination process

Following Judge Sullivan's decision upholding the PTO's withdrawal procedure, now on appeal, the PTO replaced the original Examiners Langel and Kalafut with a "Secret Committee" to reject all BlackLight applications. To adequately respond, BlackLight's counsel has sought to discover the identity of all Committee members, as well as any outside consultants or competitors, involved in the examination process and the nature of their involvement. To our amazement, the PTO has thwarted those efforts at every turn, as well as similar inquiries into this matter by five U.S. Senators.

Through our own discovery efforts, one of the Secret Committee members contributing to the prosecution was identified as Vasudevan Jagannathan. Despite Examiner Jagannathan's role in examining our applications, he initially refused to admit his involvement. Examiner Jagannathan later refused to even attend an interview scheduled with Dr. Mills, counsel, and myself to discuss the pending rejections in an attempt to reach an agreement over the patentability of the claimed inventions. Examiner Jagannathan ultimately appeared at the interview, but only after being ordered to do so by his immediate supervisor, to whom we complained. The interview however, almost ended as soon as it began when counsel requested full identification of those persons responsible for examining our pending applications. In response, Examiner Jagannathan became quite hostile, threatening to adjourn the interview if we further pressed that line of inquiry, unjustifiably asserting that it was "not germane" to the prosecution.

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We believe that such secret examination proceedings are not the way to conduct PTO business, especially in light of the suspicious circumstances surrounding withdrawal of BlackLight's applications. These proceedings do little to instill confidence in the examination process. Like any applicant. BlackLight is entitled to a fair hearing, which includes the right to directly confront those persons responsible for refusing us our patent grant. We hope that this issue will also be on the table for discussion should you be kind enough to grant us a meeting.

These are but a few of the more egregious examples of how the PTO has mishandled the examination process leading up to and following the withdrawal of BlackLight's applications from issue. Equally distressing is the substance of the Secret Committee's refusal to grant BlackLight's patents based on challenges to the operation of our disclosed hydrogen technology.

BlackLight has submitted an unprecedented amount of scientific evidence—costing tens of millions of dollars to produce—proving beyond question the operability of our technology. As former Assistant Secretary of Energy in the Reagan administration with a Ph.D. in Nuclear Engineering from M.I.T., I can personally attest to this fact. Anyone, however, with even a basic understanding of chemistry and, more importantly, an open mind willing to look seriously at our data, can confirm for themselves that Dr. Mills' novel hydrogen chemistry is producing truly astonishing results.

Incredibly, the Secret Committee has basically dismissed our scientific evidence or ignored it altogether on the basis that it supposedly violates "ideas" of modern science. For example, the scientific evidence we submitted includes spectroscopic data that is extraordinarily reliable in analyzing chemical compositions. Such data amounts to a "chemical fingerprint" that cannot be seriously disputed. Yet, Examiner Jagannathan dismissed that conclusive evidence out of hand as nothing more than "a bunch of squiggly lines."

Words can hardly express the extreme frustration—and forgive me for saying, deep resentment—we feel in having our pioneering technology treated in such a cavalier way. I could go on and on citing other examples of similar indignities suffered at the hands of the Secret Committee and, hopefully, we will be allowed to convey those details to you in person. Suffice it to say for now that the positions espoused by the Committee hardly satisfy the Constitutional directive that the patent system "promote the progress of science and the useful arts."

Please let me know at your earliest convenience if you share our desire for a meeting to discuss this matter. If you do, please further consider holding this meeting at our facilities in Cranbury, New Jersey so that you can witness first hand our working prototypes of Dr. Mills' energy cell and his assortment of novel hydride compounds exhibiting unusual properties.

I look forward to receiving your response and wish you well in your new undertaking.

Most sincerely,

Shelby T. Brewer

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Under Secretary of Commerce For Intellectual Property and Director of the United States Patent and Trademark Office Washington, DC 20231 www.usplo.gov

APR 24 2002

Mr. Shelby T. Brewer 2121 Jamieson Avenue, Suite 1406 Alexandria, Virginia 22314

Dear Mr. Brewer:

Thank you for your letter requesting a meeting with The Honorable James E. Rogan, Under Secretary of Commerce for Intellectual Property and Director of the United States Patent and Trademark Office, to discuss a number of U.S. patent applications submitted by BlackLight Power, Inc. Your letter has been referred to me for reply.

We appreciate your interest in this matter, but, unfortunately, must decline your request for a meeting due to the fact that USPTO is not in a position to discuss the issue at the present time.

Sincerely,

Jason C. Roe Chief of Staff



Under Secretary of Commerce For Intellectual Property and Director of the United States Patent and Trademark Office Washington, DC 20231 www.usplo.gov

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Shelby T. Brewer 2121 Jamieson Avenue, Suite 1406, Alexandria, VA 22314 703 567 1284

April 2, 2002

The Honorable James E. Rogan Director, U.S. Patent and Trademark Office Washington, D.C. 20231

Dear Director Rogan,

Attached is a letter I sent to you in December 2001.

I would like to have a brief meeting with you sometime in early May 2002, if possible. The subject of the meeting is the content of the December 21, 2001 letter.

Respectfully,

Shelby T. Brewer

uses in the ordinary course of its business. Should any other documentation that catalogs the contents of the off-site warehouse exist that would be of assistance in determining whether further responsive documents exist at the site, Dell shall provide that documentation to Tulip. Should Tulip request additional responsive documents based on the index or catalog, Dell shall promptly comply.

2. Dell shall provide Tulip with responsive e-mail and electronic documents for the following persons: John Stuewe, Jeff Clarke, Gary Curtis, Karl Steffes, Timothy Radloff, Ajay Kwatra, Abeye Teshome, Matthew Mendelow, Kevin Miller, Richard Chan, Neil Hand, Joseph Marengi, Eric Sholder, and Ro Parra.

Dell shall provide the e-mails in electronic form to Tulip's consultant, Ontrack. Ontrack shall then have the opportunity to review the e-mails electronically, by searching the e-mails using an agreed upon set of search terms. Any e-mails that contain one of those search terms shall be reviewed by Dell and produced to Tulip subject to confidentiality and privilege designations.

- 3. Dell shall use its best efforts to identify, recreate, and produce to Tulip the contents of Box 92. In addition, when Dell seeks to dispose of documents from its off-site warehouse, Dell should continue to submit to Tulip a list of documents that it intends to destroy, so that Tulip can request that certain boxes, which it believes are responsive, be maintained for a reasonable period to allow them to searched, copied, and produced.
- 4. Dell shall endeavor to provide Tulip with the answers to its questions that its 30(b)(6) designee could not. Should another deposition be required, Dell shall pay the costs of that deposition.
- 5. The court will not at this time extend fact discovery from its current May 10, 2002 deadline. The parties should either submit to the court a mutually agreed-upon revised schedule or submit. In the event that the parties cannot come to an agreement on an extension, the parties shall submit a letter to the court setting forth their respective positions on whether the current discovery schedule should be extended.

BlackLight Power Inc. v. Rogan

U.S. Court of Appeals Federal Circuit No. 00-1530 Decided June 28, 2002

PATENTS

[1] Practice and procedure in Patent and Trademark Office — Fees (§ 110.03)

Practice and procedure in Patent and Trademark Office — Prosecution — Rules and rules practice (§ 110.0905)

- U.S. Patent and Trademark Office may withdraw patent application from issuance after issue fee has been paid, even though second paragraph of 35 U.S.C. § 151 states that patent "shall issue" upon payment of fee, since opening clause of Section 151 conditions issuance on whether "applicant is entitled to a patent under the law," and since Section 151 does not prohibit PTO from interrupting sequence of procedures for notice of allowance and issuance if PTO officials reasonably believe that condition has not been met.
- [2] Practice and procedure in Patent and Trademark Office Fees (§ 110.03)

Practice and procedure in Patent and Trademark Office — Prosecution — Rules and rules practice (§ 110.0905)

U.S. Patent and Trademark Office is not required to make final determination of unpatentability before withdrawing application issue pursuant lo 37 C.F.R. from § 1.313(b)(3), which permits PTO to withdraw application after payment of issue fee on ground of "unpatentability of one or more claims," since PTO's responsibility for issuing sound and reliable patents, complexity of examination process, and potential for error weigh in favor of according PTO latitude to withdraw application without final determination of unpatentability if responsible PTO official reasonably believes application may have been allowed in error, and exigencies of time do not allow for such final determination.

[3] Practice and procedure in Patent and Trademark Office — Fees (§ 110.03)

Practice and procedure in Patent and Trademark Office — Prosecution — Rules and rules practice (§ 110.0905)

U.S. Patent and Trademark Office did not act in arbitrary or capricious manner by withdrawing patent application from issue pursuant to 37 C.F.R. § 1.313(b)(3), which permits PTO to withdraw application after payment of issue fee on ground of "unpatentability of one or more claims," since PTO group director who requested that application be withdrawn, being generally 'advised of application's scope, reasonably believed that it had not been adequately examined, and took only available action to return application to examination, and since that summary action was reasonably within scope of agency's authority.

Appeal from the U.S. District Court for the District of Columbia, Sullivan, J.; 55 USPQ2d 1812.

Action by BlackLight Power Inc. against James E. Rogan, in his capacity as Director of the U.S. Patent and Trademark Office, alleging that withdrawal of patent application from issue by PTO, after plaintiff had received notice of allowance and paid issue fee, violated Administrative Procedure Act. Plaintiff appeals from grant of summary judgment for defendant. Affirmed.

Donald R. Dunner and J. Michael Jakes, of Finnegan, Henderson, Farabow, Garrett & Dunner, Washington, D.C.; Michael H. Selter and Jeffrey S. Melcher, of Manelli, Denison & Selter, Washington; Jeffrey A. Simenauer, Washington, for plaintiff-appellant.

John M. Whealan, Marshall S. Honeyman, Stephen Walsh, and Henry G. Sawtelle, of Office of the Solicitor, U.S. Patent and Trademark Office, Arlington, Va., for defendant-appellee.

Before Newman, Clevenger, and Schall, circuit judges.

Newman, J.

The question on appeal is whether the Director of the Patent and Trademark Office had the authority summarily to withdraw Black-Light's patent application from issue, following Notice of Allowance, payment of the issue fee and notification of the issue date, and with

publication of the drawing and claim in the Official Gazette. We conclude that such withdrawal was within the scope of the Director's authority and responsibility for performing the mission of the Patent and Trademark Office, when viewed in light of the unusual circumstances of this case. The district court's judgment is affirmed.¹

BACKGROUND

BlackLight Power Inc. conducts research into new sources of energy. BlackLight is the owner of United States Patent Application No. 09/009,294 entitled "Hydride Compounds." As described in BlackLight's brief, the inventions claimed in this and several related patent applications and an issued patent are directed to new energy technology derived from hydrogen compounds, and new compositions including conductive magnetic plastics and corrosion-resistant high-strength coatings.

During examination of the '294 application, the examiner initially rejected the claims on various grounds including operability under 35 U.S.C. § 101 and enablement and definiteness under § 112. After further prosecution including discussions of experimental results and the submission of samples, the examiner withdrew the rejection and allowed the claims. A Notice of Allowance was issued on October 18, 1999, the issue fee was paid, and issuance was noticed for February 29, 2000.

Another BlackLight patent application, entitled "Lower-Energy Hydrogen Methods and Structures," issued as United States Patent No. 6,024,935 on February 15, 2000. Shortly thereafter, prompted by an outside inquiry, the Director of the Group that had examined these applications was made aware of both the '935 patent and the imminent issuance of the '294 application. By Declaration filed in the district court, Group Director Kepplinger stated that upon reading the patent her "main concern was the proposition that the applicant was claiming the electron going to a lower orbital in a fashion that I knew was contrary to the known laws of physics and chemistry." Director Kepplinger believed that the '935 patent and the '294 application were directed to similar subject matter, and contacted Robert Spar, Director of the Special Program Law Office in the Office of the Deputy Assistant Commissioner for Patents. Director Spar stated by

¹ BlackLight Power, Inc. v. Dickinson, 109 F. Supp.2d 44, 55 USPQ2d 1812 (D.D.C. 2000).

Declaration that Director Kepplinger expressed concern that the '294 application

"possibly had serious and substantial patentability problems and asked me to withdraw it from issue for further review."

On February 17, 2000 a Notice was issued to BlackLight, stating that the '294 application

"is being withdrawn from issue pursuant to 37 C.F.R. 1.313... to permit reopening of prosecution... [as] requested by the Director, Special Program Law Office." It is undisputed that no one involved in the withdrawal had reviewed the '294 patent application before issu-

ance of the Notice; at the argument of this appeal the PTO Solicitor stated that the application was not available for review because the

file was in Pennsylvania for printing of the

patent document.

BlackLight's attorneys made prompt inquiries about the withdrawal. The PTO treated the inquiries as a petition to the Commissioner requesting reversal of the withdrawal. On March 22, 2000 the petition was denied by decision of Assistant Deputy Commissioner Kunin. The decision stated that "[t]he PTO has an obligation to issue patents that meet the statutory requirements for patentability," and concluded that Director Kepplinger did not act improperly in obtaining withdrawal of the '294 application for further examination. The decision referred to Director Kepplinger's concern about the correctness of the scientific theory set forth in the issued '935 patent, described in the decision as "the discovery that energy was released by stimulating hydrogen atoms to relax, and, in so doing, to shrink to smaller radii, and to also attain energy levels below their 'ground state' according to a 'novel atomic model,' " and Director Kepplinger's belief that the '294 application was based on the same theory. The decision stated that Commissioner Kunin's inspection of the '294 application "reveals that this invention is asserted [sic] to matters containing fractional quantum numbers. Such fractional quantum numbers do not conform to the known laws of physics and chemistry." The decision did not further discuss patentability, but stated that the application would be returned to examination.

Meanwhile, on March 1, 2000 BlackLight filed suit against the PTO Commissioner (now denominated "Director") in the United States District Court for the District of Columbia, charging that the withdrawal was contrary to law and in violation of the Administrative

Procedure Act, 5 U.S.C. § 701 et seq. Black-Light argued that 35 U.S.C. § 151 compels issuance when the issue fee has been paid:

35 U.S.C. § 151. If it appears that applicant is entitled to a patent under the law, a written notice of allowance of the application shall be given or mailed to the applicant. The notice shall specify a sum, constituting the issue fee or a portion thereof, which shall be paid within three months thereafter.

Upon payment of this sum the patent shall issue, but if payment is not timely made, the application shall be regarded as abandoned.

BlackLight argued that § 151 does not allow for withdrawal of an application by the PTO after the issue fee has been paid, and that the PTO officials exceeded their authority when they withdrew the '294 application.

BlackLight also argued that 37 C.F.R. § 1.313, the regulation cited by the PTO in withdrawing the application, violates the mandatory statutory language of § 151:

37 C.F.R. § 1.313

(a). Application may be withdrawn from issue for further action at the initiative of the Office or upon petition by the applicant

(b). Once the issue fee has been paid, the Office will not withdraw the application from issue at its own initiative for any reason except:

- (1) A mistake on the part of the Office;
- (2) A violation of § 1.56 or illegality in the application;
- (3) Unpatentability of one or more claims; or
- (4) For interference.

BlackLight stated that even if some form of withdrawal authority were deemed to exist as set forth in § 1.313(b), the PTO exercised that authority in an arbitrary and capricious manner, for there had been no determination of unpatentability of any of the claims allowed in the '294 application.

The district court held that the PTO's interpretation of its statutory authority is entitled to deference in accordance with Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842-44 (1984), and that the district court had so held in Harley v. Leh-

[44 USPQ2d 1699] and not a mere hint or suspicion. The district concluded that the awing from issue the "final pronouncement" of unpatentability at

the time of withdrawal.

man, 981 F.Supp. 9 [44 USPQ2d 1699] (D.D.C. 1997). The court concluded that the PTO's action in withdrawing from issue the '294 application (and subsequently four related applications) was "reasonable," reasoning that 37 C.F.R. § 1.313(b) "functions as a last-chance procedural measure to observe the PTO's central mandate of issuing viable patents," and sustained the action of the PTO.

DISCUSSION

BlackLight argues that 35 U.S.C. § 151 commands the PTO to issue the patent upon payment of the issue fee, pointing out that the second paragraph of § 151 states that "the patent shall issue" upon payment of the fee. The PTO responds that § 151 starts with the conditional clause: "If it appears that applicant is entitled to a patent under the law"

[1] We agree with the PTO that while the words "shall issue" indeed impose a duty, the preface to § 151 places a condition on that duty. This preface conditions not only the issuance of the notice of allowance but also the ensuing steps of § 151. Statutory interpretation is "not guided by a single sentence or member of a sentence, but look[s] to the provisions of the whole law, and to its object and policy." Dole v. United Steelworkers of Am., 494 U.S. 26, 35 (1990) (internal citations omitted).

Both paragraphs of § 151 together define the obligations and procedures of the notice of allowance and issuance. Section 151 does not prohibit the Office from interrupting the sequence if the condition set forth in the opening clause is reasonably believed not to have been met. Correct statutory interpretation is that which is "most harmonious with [the statutory] scheme and with the general purposes that Congress manifested." Commissioner v. Engle, 464 U.S. 206, 217 (1984) (internal citations omitted). We conclude that § 151 does not prohibit withdrawal by the PTO of a patent application after the issue fee has been paid.

BlackLight states that even if the PTO has statutory authority to withdraw applications, such withdrawal is limited to the grounds specified in the implementing rule, 37 C.F.R. § 1.313(b). BlackLight argues that none of these grounds applied, and specifically that ground (3), "unpatentability of one or more claims," requires a determination of unpatentability before the provision can be invoked,

[2] The object and policy of the patent law require issuance of valid patents. This responsibility, and the mission of the PTO, require authority to implement § 151 by taking extraordinary action to withdraw a patent from issue when a responsible PTO official reasonably believes that the subject matter may be unpatentable and that the application may have been allowed in error. The complexity of the examination process, and the potential for error in any human activity, weigh on the side of according the PTO latitude to withdraw an application from issue without a final determination of unpatentability when the exigencies of time do not allow for such determination.

[3] The decision to withdraw the application was made by PTO officials acting within their authority and in fulfillment of their obligation to assure that patents are properly examined, and valid. In Skidmore v. Swift & Co., 323 U.S. 134, 139-40 (1944) the Court observed that agency actions are entitled to judicial respect when they are reasonably taken and in accordance with the "specialized experience" of agency officials and the "validity of its reasoning." Director Kepplinger, who is presumed to be knowledgeable in the fields of physics and chemistry, upon review of the '935 patent and being generally advised of the scope of the '294 application, reasonably believed that the '294 application had not been adequately examined, and took the only available action to return the '294 application to examination. That summary action was reasonably within the scope of the agency's authority and was not an arbitrary or capricious action. In Baltimore & Ohio Railroad Co. v. United States, 386 U.S. 372, 421 (1967) Justice Brennan remarked, in concurrence, on "the importance of leaving great flexibility with the agency to deal with emergency situations" in order to avoid harming that which the agency oversees. Such action must of course be reasonable under the circumstances and rare in occurrence, lest the emergency become the rule. But when necessary in order to fulfill the PTO's mission, with safeguards to the interests of the applicant including fair and expeditious further examination, we agree with the district court that the action taken is

a permissible implementation of the statute and regulation.

The PTO's responsibility for issuing sound and reliable patents is critical to the nation. It has not been shown that the PTO's exigent action was unreasonable in view of the scientific concerns of the Group Director and the imminent issuance of the patent. In In re Alappat, 33 F.3d 1526, 1535, 31 USPQ2d 1545, 1550 (Fed. Cir. 1994) (en banc) this court sustained extraordinary action when the Commissioner in good faith believed that such action was required to ensure the issuance of valid patents, observing that "the Commissioner has an obligation to refuse to grant a patent if he believes that doing so would be contrary to law."

The judgment of the district court is affirmed.

No costs.

AFFIRMED

Tamko Roofing Products Inc. v. Ideal Roofing Co.

> U.S. Court of Appeals First Circuit Nos. 01-1382, 01-2273 Decided June 28, 2002

REMEDIES

[1] Monetary — Attorneys' fees; costs — Trademarks and unfair trade practices — Exceptional case (§ 510.0907.03)

Proper standard for awarding attorneys' fees and costs in connection with appeal, pursuant to 15 U.S.C. § 1117(a), does not require that appeal be frivolous in order to justify award of fees, or require fees to be automatically awarded whenever case is deemed "exceptional" at trial level; instead, appellate court will assess and weigh several factors, including whether appeal was on issues different from those that caused federal district court to find case exceptional, relative strengths or weaknesses of appellate issues, extent to which appeal prolonged, without adequate justification, particularly bad exceptional case, and whether losing party's position on appeal appears to be of a piece with

earlier malicious, fraudulent, deliberate, or willful acts of infringement, or is otherwise inequitable.

[2] Monetary — Attorneys' fees; costs — Trademarks and unfair trade practices - Exceptional case (§ 510.0907.03)

Prevailing plaintiff's application for award of attorneys' fees and costs in connection with defendant's unsuccessful appeal is denied, since defendant's appeal was on issues different from those that caused federal district court to find case "exceptional" under 15 U.S.C. § 1117(a), since defendant's arguments, although not strong, were respectable, and addressed areas of law that were unclear, and since appeal did not prolong, without justification, case that district court found to be exceptional.

Appeal from the U.S. District Court for the District of New Hampshire, DiClerico, J.

Action by Tamko Roofing Products Inc. against Ideal Roofing Co. Ltd. for trademark infringement, in which jury returned verdict for plaintiff. District court entered judgment awarding defendant's profits to plaintiff, ordering defendant to pay plaintiff's attorneys' fees, and issuing permanent injunction. Judgment was affirmed on appeal (61 USPQ2d 1865). On plaintiff-appellee's application for award of attorneys' fees and expenses incurred on appeal. Denied.

Christopher R. Benson, Marcy Hogan Greer, and Susan J. Hightower, of Fulbright & Jaworski, Austin, Texas, for plaintiff-appellee.

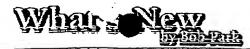
H. Joseph Hameline, Rosemary M. Allen, Geri L. Haight, and Michael B. Clapp, of Mintz, Levin, Cohn, Ferris, Glovsky & Popeo, Boston, Mass., for defendant-appellant.

Before Selya, circuit judge, Campbell, senior circuit judge, and Lynch, circuit judge.

Lynch, J.

Tamko Roofing Products, after winning its trademark infringement action at trial, and prevailing on a subsequent appeal by the infringer Ideal Roofing Company, brings this application for an award of reasonable attorneys' fees and expenses in connection with the appeal. We articulate the standards to be used in the analysis and deny Tamko's application because we find that Ideal's appeal did not





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Friday, September 6, 2002

1. HERBAL NONSENSE: DON'T MESS AROUND WITH MOTHER NATURE,

Even as many of the most popular herbal medications failed miserably when subjected to actual tests (WN 23 Aug 02), one concoction of saw palmetto, said to include seven Chinese and Indian herbs, seemed to be just as effective in treating prostate cancer as the latest prescription drugs. This was not as remarkable as it seemed: as a natural dietary supplement, PC-SPES could be sold over the counter without proof of purity or effectiveness (WN 16 Aug 02). But the FDA contended PC-SPES contained prescription- only drugs, and pulled it off the market. It is now confirmed by independent laboratories that PC-SPES contained warfarin, a blood thinner, indomethacin, an analgesic, and synthetic estrogen. These are prescription-only drugs not found in nature.

2. PATENT NONSENSE: COURT DENIES BLACKLIGHT POWER APPEAL.

The status of BlackLight Power's intellectual property is fuzzier than ever. BLP was awarded Patent 6,024,935 for "Lower-Energy Hydrogen Methods and Structures," a process for getting hydrogen atoms into a "state below the ground state" (WN 18 Feb 00). You might expect these shrunken hydrogen atoms, called "hydrinos," to have a pretty special chemistry. Do they ever! Indeed, a second patent application titled "Hydride Compounds" had been assigned a number and BLP had paid the fee. Several other patents were in the works. That's when things started heading South. Prompted by an outside inquiry (who would do such a thing?), the patent director became concerned that this hydrino stuff required the orbital electron to behave "contrary to the known laws of physics and chemistry." The Hydride Compounds application was withdrawn for further review and the other patent applications were rejected. Since the one patent already issued involves the same violations of basic laws of physics, there is a cloud over its status as well. BLP filed suit in federal court arguing that it was too late for the Patent Office to change its mind. The court was not impressed, so BLP appealed the decision. In denying the appeal, the court said the Patent Office has a responsibility to take "extraordinary action" to withdraw a questionable patent. The long-awaited IPO may have to wait a little longer.

3. LANCE BASS: MAYBE THE RUSSIANS JUST DON'T LIKE MUSIC.

Russian space officials say the boy-band star stiffed them on the \$20M fare to the ISS, so they evicted him from Star City and gave his seat on Soyuz to a box of supplies. But MirCorp still needs the don and deals are still being discussed. is said to involve a most drink company. Pepsi and Coke have fought it out a space for years. Mir cosmonauts inflated a giant Pepsi can on a space walk (WN 5 Nov 99), while Coke was involved in developing a \$3M micro-gravity Coke machine that gave only foam when it was tested before a world-wide audience on television.

Bob Park can be reached via email at opa@aps.org

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September 20, 2002

ne Newsletter of the JREF lini and the Rabbi, The Patent Office Again, A Perpetual on/Emotion Car Breaks Down, More Magnetized Water, and Where Are the Penta People....?

er Avital Pilpel, who provides us with so good items, says that he "stumbled upon" cerpt from a 1948 book, "The Unfailing (1930), the autobiography of Rabbi Dr. rd Drachman. The Rabbi was a prominent in New York's Jewish community, and was a connected with the Jewish Theological ary in NYC. He died in 1945, aged 84 years.

an interesting item, in that it provides us e views of a well-educated and intelligent r, regarding a matter that has not been well d by the media and the academic unity in general, and about which I have knowledge. This is taken from chapter 42 of ok:

A few events of special significance stand out . . . One of these was the passing of Houdini, which occurred, if I recall correctly, in the month of October, 1927.

10, it was in 1926....

It was my sad privilege to officiate at the funeral. His passing became the occasion for the widespread discussion of his personality and the extraordinary powers

which he unquestionably possessed. His ability to free himself with astonishing swiftness from chains and padlocks and other means of restraint baffled all investigators.

What these powers were I, of course, know as little as anyone else, but they certainly were far exalted above the vulgar sleight of hand and tricks of ordinary so-called magicians. The Spiritualists claimed Houdini as one of their own and asserted that his escape from apparently insuperable means of confinement was due to his ability to dematerialize his body and thus pass through all physical restraints. Houdini himself denied that he was a Spiritualist medium — he was, indeed, an outspoken opponent of Spiritualism — and stated that his performances were strictly in accordance with natural law.

abbi Drachman could have accepted this simple, correct, honest, direct, ant from Harry Houdini, but that would seem to require the Rabbi to admit that not understand how the apparent miracles of the magician had been alished. So, he ascribed special mystical powers to Houdini, forces that no



HARRY HOUDINI

Commentary Archiv



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not even Houdini himself, could be e... ?d to understand. And that scenario, as to so many others who have wond. ... out such matters, satisfied the ?m. I must differ with his designation of slets—of-hand as "vulgar." True, some pretty bad, but even the fumblers among us don't deserve that adjective....

This statement, of course, left the matter as much of a mystery as before. The Spiritualists refused to accept Houdini's denial that he was a medium. They insisted that he was. They even tried to drag me into the controversy as upholding their contention. In my funeral address, I had used the words, "Houdini possessed a wondrous power that he never understood and which he never revealed to anyone in life." These words are to be taken in their narrowest and most literal significance. All I meant was that Houdini possessed an extraordinary and mysterious power — and by that statement I am still willing to stand — the precise nature and quality of which was not clear even to him and that he had never taken anyone into his confidence nor revealed what his concept of his extraordinary gift was.

I must tell you that Harry Houdini fully and completely understood his "powers," hey were the same as those possessed by magicians from the very first ent a rascally cave-man asked his friend to "Choose a rock, any rock." drous" only applies from the point of view of the average spectator. And, I must Houdini's methods and secrets were well-known — to the magicians — in his ifetime. We "in the trade" are well aware of his methods, they are still in use , and will be in active use when a future mountebank (just kidding!) asks a fair en, "Choose a planet, any planet."

But the Spiritualists seized upon these words to draw from them the utterly unjustified inference that I considered Houdini a Spiritualist medium and that his extraordinary powers were derived from a supermundane, non-material source. Arthur Conan Doyle, the well-known author and Spiritualist leader, interprets them to that effect in his book, "The Edge of the Unknown." [1930] Of course, I meant nothing of the kind. My statement was simply a recognition of his undeniably extraordinary power, concerning the nature of which I admit that I am just as ignorant as everybody else, including A. C. Doyle, neither more nor less.

However, it is not because of this aspect of his personality that I esteemed and respected Houdini and cherish his memory. My respect and, I may say, my love went to him, as a true friend, as a generous and unselfish character, as a loyal and truly filial son, and as a Jew with a warm Jewish heart. As such and for these reasons his name will ever be held in honor as a worthy son of Israel.

ed. That last sentence is certainly true and sensible. Harry Houdini was a mer of apparent miracles, and not one who claimed his tricks were the real. He freely admitted, and in fact insisted, that there was nothing supernatural or ormal about his abilities, and that in itself should invoke our serious respect. He man who because of his fame and his talents could have chosen to claim that is specially gifted, but he did not; he had a deep sense of his ethnic background adition, his family responsibilities, and in particular his need for the acceptance beloved mother. Not only the Jews, but all of us can rejoice that he was among

lpel adds:

Obviously, there is nothing new under the sun. Spiritualists who claimed that Houdini was a medium who wouldn't admit it, moved on to blaming Randi for deliberately using his formidable "psychic powers" to thwart the efforts of would-be challengers to win the foundation's \$1,000,000 prize... One would have hoped that the "mediums" and other frauds would at least try to change their modus operandi once every fifty years or so. Ah, well....

atent was for "Lower-Energy Hydrogen Methods and Structures," which they be as a process for getting hydrogen atoms into a "state below the ground whatever that means. Yes, I'm admitting my ignorance of the subject, but I happily to Bob. The patent involved something called "shrunken hydrogen, called "hydrinos." Bob writes:

... the patent Director became concerned that this hydrino stuff required the orbital electron to behave "contrary to the known laws of physics and chemistry." The Hydride Compounds application was withdrawn for further review and the other patent applications were rejected. Since the one patent already issued involves the same violations of basic laws of physics, there is a cloud over its status as well. BLP filed suit in federal court arguing that it was too late for the Patent Office to change its mind. The court was not impressed, so BLP appealed the decision. In denying the appeal, the court said the Patent Office has a responsibility to take "extraordinary action" to withdraw a questionable patent.

! But why, hard on the heels of re-examining other questionable patents (see weeks ago on this page), would the Patent Office have happened upon this alar one, when there are so many in this category? The secret can be inferred to Park's weekly column, where we find: "Prompted by an outside inquiry would do such a thing?) . . ." That rascal!

ery fact that the Patent Office has paid heed to the complaints that Park, the and others have made, speaks well for rationality. Let's hope that we can look d to many quack devices and systems being re-evaluated. Let's see a lot more "extraordinary action" from the Director. As for Blacklight Power, says Park, long-awaited IPO may have to wait a little longer."

similar subject, reader David J. Schuller informs us of yet another entry in the nergy/perpetual motion" racket, a car that was recently scheduled to do sive test runs at a big race track, rented for that very purpose. Depend on it, heme, too, will make money while federal trade agencies and law enforcement us to look the other way. Life savings will be lost, and those who can least to go under, will find themselves adrift while the promoters wear a path to their David tells us...

... of a demo of an electric car which is supposed to recharge itself (i.e. perpetual motion). The inventor is Carl Tilley of Lebanon, Tennessee, at www.greaterthings.com/News/Tilley/newstuff/index.html. The car ran a few laps, then conveniently broke down due to mechanical failure not associated with the power source. Be sure to note the exclamations about the resting voltage measured on the batteries (as opposed to measuring under load). Next time they say they'll bring two cars instead of one. I'm sure that will be Real Soon Now. Be sure to check out the other articles on the web site which provide the regular updates: www.greaterthings.com/News/. It appears to be vaguely Christian with a strong interest in conspiracy theories. I'll keep an eye on [a local newspaper that covered the event] for a few days to see if they do any followup or not. In fact, I think I'll send them a note specifically requesting followup.

n a moment. Looking at the er Things" page, I see that these



are not just, as David says, "vaguel, jan," at all. They're raving loonies! ie very big on quotations, utarly from the Bible, but not much ality. The crazy old ntrails/contrails" thing is discussed, with the dreaded "666" subject; they us that Bill Gates, Saddam Hussein, Kissenger (their spelling), and even aur Barney, are all represented by and they ponder on whether Prince





Canadian road sign

es is actually Salan. The "Bible Code" is a big theme here, too. But the very and most potent revelation of all is found in their warning that the US FEMA ral Emergency Management Agency) has embarked on imposing "Marshall (their spelling) on the citizens of the USA, a scheme which is cleverly saled in their officers' shoulder-badge — seen here — the very same symbol are Canadian Government uses to indicate disaster-escape routes! How could it y clearer that evil forces are at work here? The text of this warning even tells us ne of the Canadian highway signs was discovered to be located "right IN IT of a church"!

amous poet might have said, "An equilateral triangle is an equilateral triangle is uilateral triangle," or a famous quack psychiatrist could have declared, etimes a triangle is just a triangle."

t's get back to the "real" science here, while not dismissing the paranoia, of e. (If you did that, people would start talking about you....) The brains on the site tell us that the twelve 12-volt batteries (!) that run the car are "recharged by rietary internal process." Then they reveal the big secret of this process by 3, "The battery gets the motor going, and the motor then feeds energy back to atteries." This is the method? The mind boggles....

o top off the account of this aborted demonstration of the car, we're informed ney didn't get the expected constant feedback from the race track, because the y on their reporter's cell phone went dead. Seems appropriate.

If put in here a simple question for David, who so kindly alerted us to this r. Why do I receive so many of these items written all in lower case, without uation or spacing between sentences, and all in one monstrous paragraph? It is pick through and revise the text, space it, and punctuate it, to make it ble and suitable for use. Are the shift key and space bar that hard to find on eyboard, David? I'll send you a diagram....

en sent a correction of some exchanges I quoted here two weeks ago. I got ributions and the division wrong. It's a change from this:

[To George] Sure you do. It works just as well as the magic fuel conditioner you sell. Ad nauseam, I note that this "demo" would win you a million if you could do it double blind. But you won't even try, because Randi won't accept such a challenge. The studies have been done and demonstrate the difference between magnetically treated and untreated water. Kronenberg published the before and after magnetic treatment pictures and you saw them. Cranfield University has similar before and after pictures on their web site from their studies and you saw them. Trinity College Dublin have before and after pictures from their study and you saw them.

[To John Bain from George] Sure you do. It works just as well as the magic fuel conditioner you sell. Ad nauseam, I note that this "demo" would win you a million if you could do it double blind. But you won't even try....

[From John Bain to George] Because di won't accept such a schallenge. The studies have been done all emonstrate the difference between magnetically treated and untreated water. Kronenberg published the before and after magnetic treatment pictures and you saw them. Cranfield University has similar before and after pictures on their web site from their studies and you saw them. Trinity College Dublin have before and after pictures from their study and you saw them.

That did seem a bit strange when I first saw it. Removing the endless codes insfer text, I sometimes lose important factors. Sorry! And yes, we will accept test, Mr. Bain, just so long as "tap water" or similar water without any added ic compounds, is used. In fact, I e-mailed Mr. Bain as follows:

I course not impossible that magnetic treatment of specially-selected water as might give the result you claim. The Trinity College account that you cite pecifies "mineral water" and "well water." Both these are very general terms, ned, and totally unacceptable. Please do not now report that 'James Randi that treatment by static magnets alters water in such a manner that a suitably ve person can detect, by taste, the difference between treated and untreated 'This is not what I'm saying."

Ir. Bain, whether or not we accept the Trinity College material, or the nberg or the Cranfield accounts that you quote, has nothing to do with your You have a specific claim. Let's get on with it.

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rd Morey from Australia sent us this newspaper article on the same tired, silly bject of weeping, bleeding religious figures:

Weeping Statue Draws Crowds

A fiberglass statue of the Virgin Mary bought in Thailand eight years ago has attracted hundreds of sick visitors to the suburban Perth home of Patty Powell. The statue has been claimed by many to be a miracle because it appears to drip a rose-scented oil-like substance from the eyes.

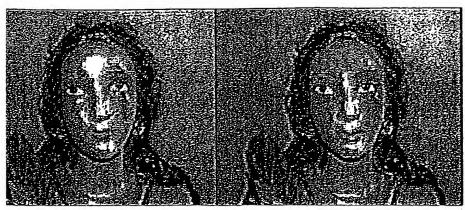
Ms. Powell said when the statue first cried on March 19 this year, she became overwhelmed with grief. "I cried the first time, it felt like my own mother was crying, it was a very humbling experience and really blew me away," she said. She said she was not sure whether it was a personal revelation she had witnessed until the statue "cried again" over the Easter period.

She said the statue, which she said she bought for about \$150 at a religious shop in Bangkok, has since been weeping continuously. "I knew in my heart then what was happening and thought that maybe this was supposed to be seen by more people than just me." Since then, hundreds of people have made the pilgrimage to Ms. Powell's Rockingham home where she has set up a shrine to the Our Lady of Lourdes church to see the statue on display and to touch some of the oil. "The people who come to see her (the statue) are so devout and so reverent, it feels as if my life is just beginning."

She said that she did not know whether the statue would continue to weep or whether she would move it from her home but wanted to take things on a "day-to-day basis at this stage." Ms. Powell said Catholic Archbishop Barry Hickey had seen the statue but had said that as yet, no official proceedings would be made to have the its powers formally recognized by the church.

the section of the se

yod. That's refreshing indeed. Hey, folks, gup! Ask a few basic questions. The an adolescent in the house? Anyone elsewith something to prove? Does owell herself have an axe to sharpen, here?



Before

After

armed an experiment. This statue, a plaster one that sells for \$1,000, can be improved just by keeping the rascals from secretly squirting oil, perfume, ag lotion, or cologne, on the lady. See the results!

er David Bellows writes us about his ience with one of the scams we've handled We're still waiting to hear from the Penta e, who we understand have been hiding in a n Colorado with Sylvia Browne:

I happen to work at a health food store in Atlanta, Georgia. One of our best-selling products is Penta water, in fact we bring in around 200 cases of the stuff every week. I work in the produce section so I do not have much contact with people looking at Penta water. However, since I've been there for over six years people do occasionally seek out my opinion.

Recently a man came up to me with three cases of Penta water in his cart (most people buy by the case it seems) and



Skeptics searching for Sylvia Browne and the Penta executives......

asked me what I thought of it. I told him that it appears to be the same filtered water ("reverse osmosis") we self for \$.39 a gallon and that there have been no reliable studies conducted to indicate otherwise. He said that he'd been using the water for several months and that it seemed to help him but he couldn't be sure that it wasn't just all in his mind. His use of it is based on the claim that because it is supposedly absorbed better into your cells you'd have less "left-over" water that would be eliminated by urination. This is a concern for him as he is a long-haul truck driver and given that he drinks lots of water while driving he doesn't want to have to pull over for rest stops every lifteen minutes.

I told him that we, as humans and whatever before had been drinking regular old water for thousands, tens of thousands, and even hundreds of thousands of years and our bodies were probably pretty good at handling it by now whether or not it "clusters" like Penta claims. He laughed and said that I'm probably right and put back one of the cases. Small victory (he did still buy two cases) but the important thing is that

it had already occured to him that had might possibly not be real.

itive effects he'd witnessed

My comments perhaps provided some confirmation which made it easier for him to put back one of the cases. Of course causing the store to lose sales like this does eventually hurt me in the pocket book, but if people ask my opinion I give it.

(There is a new water being sold in our store called Vivo Water. It claims to "clump" in some beneficial manner. More than a few customers have noted the apparent contradiction in "water theory" between Vivo and Penta. When they ask my opinion all I can do is shrug.)

, I sometimes think of how embarrassed I would be if I were caught buying Water or any of the other quack material so widely sold now. Reminds me of se that illustrates how mores have changed in recent years:

A teenage boy steps up to the pharmacy counter and loudly declares, "I'll take a dozen of your best condoms!" As the clerk reaches for the merchandise, the kid leans forward and whispers softly to him, "And—a pack of Marlboros...."

er Brian S. Lewis chides me about writing: "I have great faith in the Sun ng up tomorrow morning because evidence — my experiences, some 27,073 m to date — have established for me that it's quite probable that the event will ." He says:

I don't disagree with your point, but there is one small thing that needs saying: there is no logically sound reason to base guesses about thefuture on events in the past. Perhaps the way that it works is that James Randi is born, and the Sun goes out on his 27,100th day. There is a philosophy thought-problem related to this in which people are having a raffle over the course of a week and are guessing which color god will make the sky. I think I read about it in Simon Blackbum's book, "Think."

is missing the point here. What author Blackburn refers to are phenomena like g a "fair" coin. No "run" or pattern of "heads" (or "tails") can influence the next at the rising of the Sun is something that depends upon huge physical systems by in action, which have been in place for a very long time, that have huge and that are therefore predictable and dependable. The coin-flipping is an tially randomized act; the rising of the Sun is not. And remember that I carefully quite probable," not "certain," for everything just might vanish ten minutes from That's quite improbable, I must add....

er writer, Sivar, scolded me for having an inaccurate number of Sun-risings in perience-span. I answered that I was once lost underground in a cave for two; (not true, but the best I could come up with), and that I used 365.25 as the er of days in a year, rather than the 365.25625 he used. Okay, if I'm going for sints of decimal accuracy, I should have used 365.26.... Picky, picky, picky! Of etc. I could get into the choice of a solar, sidereal, or anomalistic year — though not a lunar year.

VOITE.			

er Randall Boyce comments:

......

I am glad you pointed out in your "Survival Without Magic" article that the author wrote it 34 years ago. However, I was offended that you did

not mention the fact that the philos.	of Political Correctness has
been scientifically proven by some or	t thinkers of our time like
Jesse Jackson and Jane Fonda. Perha	ps need more Sensitivity
training.	

)\$.....

being posted while I'm still in Italy. Since I'll be getting back barely in time to e a new page change, the next one may be a bit short....

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Dozens of recent patents have been awarded for devices that invoke principles outside accepted science, such as exotic nuclear physics and psychic forces

'New Physics' Finds a Haven At the Patent Office

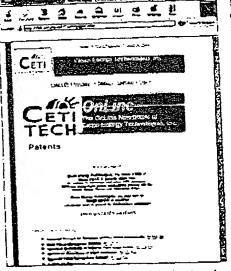
A famous cartoon shows a man waiting outside the Patent Office with a complicated gadget in his lap. He looks over and sees another man holding exactly the same contraption. The image reflects a common myth—that the government checks that an invention relies on accepted principles before granting a patent. But consider two recent patents: 5,616,219 and 5,628,886, issued to Clean Energy Technologies Inc. of Sarasota, Florida,

for an electrochemical device that is claimed to put out more energy than is possible by chemistry alone. Or take Clean Energy's patent 5,672,259, for a process to transmute radioactive elements by electrochemistry. Physicists who have examined these patents say the claims resemble cold fusion; the company rejects that label but says its producis do exploit "new nuclear physics." Either way, the devices would challenge some basic notions of modern physics if they worked as advertised. A cursory search of recent patents reveals

dozens of others like them. Such patents confer prestige and legitimacy, amacting investment dollars and sustomers. "Having a patented device, with lots of fancy equations in the manual, that's partly why people take it seriously," says Keith Conover, a University of Pittsburgh physician who has studied a patented instrument said to be able to find buried disaster victims by "dielectrokinesis." Patents like those awarded to Clean Energies have also helped keep the cold-fusion field alive. Roundly scorned by the scientific establishment in the 10 years since Stanley Pons and Martin Fleischmann first said they had achieved fusion in a jar, claims of unlimited energy live on-albeit under other names—in the patent blerature.

Most disturbing to some onlookers is the window such patents offer on the patent examination process. The U.S. Patent and Trademark Office (USPTO) is now staggering under an onslaught of patent applications. Its nearly 3000 examiners must process roughly 240,000 intellectual property claims every year, a number that is increasing by more than 8% annually because of increases in software and biotech applica-

tions. Says one former USPTO employee, "They are desperate and they're hiring like crazy. The office plans to add another 700 examiners in the coming year. And as Richard Maulsby, a PTO spokesperson. admits, "It is very difficult for us to do all this hiring and to maintain quality." The result, in some cases, is inspectors who have link experience-or themselves devotees of fringe



Setting points. A company developing "revolutionary" energy technology lists its patents.

technology (see sidebar on p. 1254).

The Patent Office has long been besieged by inventors seeking patents on weird gadgets, and patent law is specifically written to restrict patents on one kind of device with perenniai appeal, perpetual motion machines. Anyone who wants to patent such a mechanism has to submit a working model as part of his application. For most inventions, however, the bar is lower. Except for perpetual motion machines, "the Patent Office hasn't required a working model since the 19th century." says patent attorney Michael J. Colitz, the creator of the Wacky Patent of the Month Web page Instead patent law requires only that an invention be novel, nonobvious, and reducible to practice.

"Reducible to practice" sounds like "really works." but by clever wording, patent applicants can dodge tough scrutiny of how realistic an invention is. The trick is to avoid the perpenual motion label and others, such as "cold fusion," that might raise red flags for the patent examiner who searches prior patents and judges whether a patent claim makes sense. "Each patent examiner has different criteria," says Colitz.

And these days, sincere but poorly trained examiners are making many of those judgments, says patent consultant Greg Aharonian, editor of Internet Patent News. One examiner says he was interviewed over the phone by a supervisor. A few days later he got a package in the mail. "I thought it was an application," says the interviewee. "But it was a form confirming my acceptance of the position." The low salaries at the Patent Office don't help matters, say patent examiners and outsiders. "They have a vanety of problems in not being able to retain good patent examiners because of the high salaries outside," says Aharonian. "You really have to be a patriot to want to work at the Patent Office."

Cold fusion reheated?

Inexperienced patent examiners may be one reason why some unlikely inventionshelped along by clever patent attorneyshave recently won patents. Although the Patent Office initially rejected cold-fusion patents after Pons and Fleischmann's memorable Salt Lake City press conference in 1989, some experts say the Clean Energy patents show that such patents are now slipping into the books. James Reding, Clean Energy's chief executive officer (CEO), insists that his company's technology is not "cold fusion," although he says it does exploit nuclear processes. But every physicist Science has asked about the Clean Energy patents, including IBM's Richard Garwin and William Happer of Princeton University, says they describe what are essentially cold-fusion devices. And the March/April 1999 issue of Infinite Energy magazine, a publication for cold-fusion buffs, includes Clean Energy work in its list of "Key Experiments that Substantiate Cold Fusion Phenomena."

NEWS FOCUS

The patents say that the devices generate excess heat by passing a current through a cell containing beads coated with a metal such as palladium and exposed to various hydrogen isotopes—the same setting where cold fusion was said to occur. Garwin and others say the devices are unlikely to prove viable, either as energy sources or as systems for rendering radioactive waste harmless. Conditions in an electrochemical cell fall far short of what is needed to trigger nuclear reactions, they note. 'The cell has never produced any excess heat, in my judgment," says Garwin, who has looked at Clean Energy's

data, "And this remediation of radioactive materials is incredible and has not been demonstrated." Reding responds that he knows the physics is controversial, but "the technology is very real."

Reding says that the company's first attempts to patent the devices failed because the applications went through the group of patem examiners who specialize in nuclear science. But he says that by carefully structuring another application, the company was able to steer the patent to a different group of examiners. who handle electrochemistry.

"Our patent attorney was very helpful in this process," says Reding. Attempts to reach the examiners who approved the patents have

been unsuccessful.

A check of the USPTO Web site (www.uspto.gov) also reveals other ood devices. Patent 5,830,064, for example, was granted to a company called Pear Inc. for an electronic gizmo that is meant to detect the skewing of a random signal caused by psychic forces. Pear Inc. is associated with PEAR, the Princeton Engineering Anomalies Research laboratory, which is run by Robert Jahn and Brenda Dunne, longtime parapsychology researchers who are named in the patent as co-inventors. According to the patent, the device could be used to detect the "volitional state of one or more persons" and could control games, computer displays, and appliances.

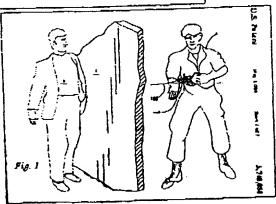
Pear Inc. has been renamed Mindsong Inc., and its Web page (www.mindsonginc. com) carries a press release about the patent, calling it the first patent for "devices responsive to intention of operators physically isolated from the device." Mindsong offers a product based on this "patented technology" that is claimed to control electrical devices plugged into ac outlets on the box, for \$425.00 plus shipping and postage.

At first glance, says physicist Marc Sher of the College of William and Mary in g Williamsburg, Virginia, the patent seems to

that generates a random signal and other electronics for detecting anomalies. "You look at the title and the abstract and it looks okay," Sher says. "Then you look at the background information and the rest of it, and it goes off into ga-ga land." If this kind of psychic control worked. Sher notes, it would be the "biggest thing since Galileo. But it has never been confirmed."

Mindsong CEO John Haaland has an answer for the skeptics: "Well, they should buy it and try it." Healand, a former vice president of the Pillsbury food company who has a Ph.D. in biophysics from the Uni-

Fig. 2



Telitale heart? Drawings from a potent that describes a device for finding intruders and disaster victims by picking up the heart's electric and magnetic fields.

versity of Minnesoga, feels that the critics have not done their homework. "They should dig harder," he says. Haaland believes the forces at work are based on the "quantum coherence of living systems," which skeptics do not understand, he says. What's not in doubt is the value of the patent to his company. "It's a very important piece of our portfolio," he says. "We've been talking to investors, and the patent is a key part of our market strategy." Haaland says the company has sold 32 of his devices so far.

The examiner for that patent, George Manuel, explained in a telephone conversa-An anomaliv works on medical de-

CHEST OF STREET, STATE AND

vices, but because of the backlog he was termporarily assigned to work on patents for games and toys, which is how the Pear patent is classified. Manuel said he didn't find anything outrageous about the patent. "I feel comfortable that this one was issued" he said. "I assume that what is put forth is legitimate."

Trust or verify

Then there is patent 5,748,088, granted for a device to locate "entities" by "dielectrokinesis." A product based on this patent is the LifeGuard system sold by DKL Inc. for the purpose of locating humans behind barriers. DKL says the LifeGuard can detect the electric and magnetic fields produced by a human heart at distances of up to 600 meters by means of a probe attached to a swivel mount. The LifeGuard products are currently being marketed for about \$8000 each (operator training is extra) to law enforcement agencies and search-and-rescue teams for detecting intruders and locating disaster victims. DKL declined to release sales figures but said that "hundreds" of units are in use.

A group at Sandia National Laboratory in Albuquerque, New Mexico, however, concluded last year that the device is ineffective, based on double-blind performance tests as well as a "teardown" and physical

analysis done at the request of the National Institute of Justice.* The Sandia group also examined DKL's scientific claims. According to a company brochure, the LifeGuard's probe swivels to point to a distant human body because of "dielectrophoresis," a term coined by University of Oklahoma physicist Herbert Pohl in the 1960s for the tendency of uncharged highly polarizable materials to point toward the strongest part of a nonuniform electric field.

As most scientists understand it, however, dielectrophoresis is a weak effect seen only in powerful electric fields. When the Sandia group ran cal-

culations using Pohl's own equations, they concluded that "there is no possibility that the DEP [dielectrophoresis] effect is responsible for the rotation of the anterma assembly." The executive summary of the physical analysis further concludes that the LifeGuard is not based on "dielectrophoresis or any other selentific principles as understood by the scientific and engineering community.

Conover, who is a 30-year veteran of search-and-rescue operations, says the Life-

 Sandia's physical analysis is available at nlectc.org/services/oklanalysis.html; the performance tests can be seen at www.prod.sandia.gov/ cgi-bin/techlib/access-control.pl/1998/980977.pdf

A Free Energy Enthusiast Seeks Like-Minded Colleagues

One patent examiner is working to make the Patent Office more hospitable to fringe energy technologies, including cold fusion: Thomas Valone, Valone, who has worked for 4 years as a patent examiner and has a moster's degree in physics, is also president of a Washington, D.C.-based outfit called the Integrity Research Institute (IRI), which advertises books and videos on antigravity, mind control, and unconventional energy sources on its Web site. In an a-mail message broadcast last year on Internet news groups dealing with fringe science, Valone called for "all able-bodied free energy technologists" to "infiltrate" the Patent Office. Valone also secured government sponsorship—it was later withdrawn—for an IRI-organized conference on cold fusion, tabletop nuclear transmutation, and various other unusual energy proposals.

Valone's e-mail message offered to accept resumes at his offices at IRI and to forward applications to the appropriate supervisor at the Patent Office Valone says he is simply trying to spread the word about free energy devices, which he feels are misunderstood, And he was briefly successful in recruiting a kindred spirit. Paul LaViolette. who was hired last year and resigned from the Patent Office on 9 April. According to the October 1998 issue of the Unofficial Gazette, a newsletter of the Patent Office employees' professional society, LaViolette's interests include assertions that antigravity technology was incorporated into the design of the B2 bomber and that the

Sphinx is a 16,000-year-old cosmological cryptogram.

La Violette confirms that Valone helped recruit him and says the Unofficial Cazette's portrait of his interests is accurate. He did not issue any patents during his short tenure, and those issued by Valone appear to be for conventional terrestrial technology. But conventional science was not the focus of the IRI's First International Conference on Free Energy, IRI persuaded the State Department last year to include its conference in the department's Open Forum program, a prestigious venue for discussions of issues in foreign policy, then promptly sent out notices in official government envelopes.

After Bob Park of the American Physical Society wrote about the meeting in his tact e-mail newsletter, What's New, the red-faced State Department insisted on having the papers peer reviewed. None of the dozen or so talks passed muster. The papers ranged from the mediocre to the truty weird," says a physicist at the State Department who was involved in carrying out the peer review. Not one of them showed any understanding of modern science." As a result, the State Department did not host the Conference on Free Energy.

But the conference was not canceled, At first, Valone moved the meeting to the Department of Commerce, where as a department employee he was able to reserve an auditorium. The meeting title was changed to the Conference on Future Energy, still hosted by IRI but advertised as being "under the auspices" of the Commerce Department. When Commerce senior staff learned of the conference, permission for use of the auditorium was withdrawn. The meeting took place at the end of April at a hotel in Bethesda, Maryland.

Guard is essentially a fancy dowsing rod. "It is clearly based on magical thinking and not scientific thinking." He says many search-and-rescue teams are financially strapped. "This expense could wipe out some units," he complains, "and it takes resources away from proven methods."

DKL President Howard Sidman says the company stands by the product and that the entics do not understand the device. "The [Sandia] report is subbish," says DK1. chief engineer Bob VanDine. Spokesperson Nancy Wolcott says that the performance testing did not follow the operator's manual, although both the Sendia report and DKL say that one of DKL's employees

was the operator for the test. DKL claims that its own analysis of the Sandia data and testing by other labs hired by the company show that the product is reliable. Further, says DKL, testing by a se-

curity company in Belgium and a crimeprevention group in Lis Angeles gave 100% success rates. Wolcon claims that Sandia has a conflict of interest because the lab is trying to sell its own sensor technology.

The examiner who handled this patent, Nina Tong, said that her job is to check and see if the claims

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Mindsong... Y.Y

are covered by previous patents. "I med to look up 'di-I couldn't find it, she says. "I trusted them that it works as they claimed, and I assumed that people skilled in the art would use this word all the time." Tong is an assistant examiner with a couple of

years' experience at the PTO and a bachelor's degree in electrical engineering. The primary examiner who signed off on the patent, Thomas Mullen, said that

Read my thoughts. Home page of a company that has patented a device it says can respond to psychic forces. he typically gives the application only a quick look to make sure all the parts are filled out.

Aharonian says that the problem goes beyond inexperienced patent examiners to

the pressure to process paper for what USPTO calls its "customers"—the patent applicants-which leaves little room for quality control. "The big betrayal at USPTO," says Aharonian, "is that they forget they have two customers: the applicants, and the American people on whose behalf the applicants are granted monopoly rights." One examiner, who requested anonymity, says that priorities have shifted at the Patent Office. "When I started several years ago, we were told 'When in doubt, reject.' But now, it's 'When in doubt, issue the patent'

Nicholas Godici, the deputy assistant commissioner for patents, refused to comment on any specific patent and denied that examiners were being hired over the phone. He added that he was satisfied with the patent examination process. Moreover, he said the USPTO doesn't check inventions to see that they work "We assume the information provided in an application is accurate. We don't have lab facilities or do testing, but we may ask for additional data from the inventor," he said.

Godici concedes that the public views patents as a stamp of approval but says that's a misunderstanding. Patents are nothing more than "a legal right to exclude others from using or profiting from an invention." Yet Clean Energy's Reding says they carry an additional cachet. "We've raised \$5 million from investors," he says, "The fact that the U.S. Patent Office has declared your invention novel and unique is -DAVID VOSS clearly valuable."



-- PTO MEMORANDUM FOR ALL EMPLOYEES: MEDIA CONTACT POLICY

Posted Date: 06/25/99 Removal Date: 07/06/99

UNITED STATES DEPARTMENT OF COMMERCE
Patent and Trademark Office
ASSISTANT SECRETARY AND COMMISSIONER OF PATENTS AND TRADEMARKS
Washington, D.C. 20231

June 22, 1999

99-42

MEMORANDUM FOR All Employees

FROM: Acting Assistant Secretary of Commerce and Acting Commissioner of Patents and Trademarks

SUBJECT: Media Contact Policy

Since a memorandum on this subject was first issued several years ago, thousands of new employees have joined the PTO. Therefore, it is a good time to reiterate PTO policy concerning employee contact with members of the media including, but not limited to, those in print, broadcast, cable and online publications.

All requests, including telephone and e-mail, from members of the media for interviews, tours, and appearances should be directed to the Office of Public Affairs (Richard Maulsby or Brigid Quinn). Public Affairs will then determine the appropriate Office response for such requests and arrange for all interviews and any other meetings with the media. A member of the Public Affairs staff may attend interviews and meetings.

This policy applies only to contact with the media, not to interactions with customers. Any questions about media contact should be directed to the Office of Public Affairs at 305-8341.

Additionally, MPEP section 1701 and TMEP section 1801 specify that Office personnel should not comment on the validity or enforceability of any U.S. patent or trademark registration. These sections also caution employees about answering other particular inquiries concerning U.S. patents or trademark registrations. Any questions on this policy should be directed to your supervisor or to the MPEP Editor at 305-8813 for patents or to the Office of the Assistant Commissioner for Trademarks at 308-8900.



UNITED L... ITES DEPARTMENT OF COMMERCE Patent and Traden C. Office Address: COMMISSIONER PATENTS AND TRADEMARK

Washington, D.C. 20231

APPLICATION NUMBER	FILING DATE	FIRST NAMED APPLICANT	ATTORNEY DOCKET NO.
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(2) S. Kalafut	(exv)	_ (4) S. Griffin	(SPE)
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SUBSTANCE OF THE INTERVIEW.

HTTHAM UT 70 INTERVIEW SUDMARY Coursel for applicant requested disclosure of the following information as being reasonably related to the prosecution of the pending patent applications: 1) Identification of all Examiners and/or, other than Those other Patent Office personnel who were identified in the pending Office Actions, rere Consulted, or otherwise provided input, in the formulation of the rejections of record. 2) Identification of all outside consultants and/or other technical personnel, including, but nothinted to, those of NIST, who were consulted, or otherwise provided input, in the formulation of the rejections of record;

3) Identification of all Patent Office officials responsible for the withdrawal of Appin Ser. No. 009, 294 from bourance, and claupication of the factual Circumstances surrounding that withdrawal, 4) Identification of any and all outside Somes of information that muy have preipitated, or otherwise contributed to, the Potent Office's withdrawal of Appn. Ser. No. 009 294 from issuance.

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The Patent office disagrees with Applicant's commented that the above-dentifie information requested at the Interview is glymane to the issues raised in the pending office Actions. The Patent office, refused to therefore, with not respond to these lines of inquiry during the Interview.



UNITED STATE THE PARTMENT OF COMMERCE Patent and Trademark Office

Address: COMMISSIONER OF PATENTS AND TRADEMARK Washington, D.C. 20231

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APPLICATION NUMBER	FILING DATE	FIRST NAMED APPLICANT	ATTORNEY DOCKET NO.
1/501622	09/11/003	Mills	
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page 1 of 4

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Wayne a Jangel



UNITED STATES DEPARTMENT OF COMMERCE PAGENT and Trail ark Office Address: COMMISSIONER OF PATENTS AND TRADEMARK Washington, D.C. 20231

APPLICATION NUMBER	FILING DATE	FIRST NAMED APPLICANT	ATTORNEY DOCKET NO.
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Applicant respected that the following points discussed at the Interview held m February 11, 2003 be unoluded as an Attachment to the Interior Sunnay Form. Applicant's coursel and the Examera in attendance at the Interview agreed to meet again at a future date, either in genon or ky telephone, to contine discussions regarding the patentsbility of Applicant's pending potent applications. Specifically, the Exerces exprend concer that the Appliant's experimental evidence be conveniente with the supe of the claims. To oddren that concern, Applicants connect agreed with the Examer. To go through the patent claim - by clair with the Examers and denominate flow the scientif data supports there claim. good 3 of 4 Wayse 9. Langel

by the date, the PTO agrees to bour those claims. For those claims that the PTO agrees to bour that the PTO determines are not supported by the data, Applicant will continue to seek that broder claim coverage in subsequent proceedings.

page 4 of 4 Wayse A. Sangel





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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
09/362,693	07/29/1999	RANDELL L. MILLS	62-226-9A	7170
20736	7590 02/26/2003			
	DENISON & SELTER		EXAMI	INER
	EET NW SUITE 700 ON, DC 20036-3307		LANGEL, V	VAYNE A
			ART UNIT	PAPER NUMBER
			1754	211.
			DATE MAILED: 02/26/2003	4

Please find below and/or attached an Office communication concerning this application or proceeding.

PTO-90C (Rev. 07-01)



UNITED STATES DEFETTMENT OF COMMERCE Patent and Trademark Office

Address: COMMISSIONER OF PATENTS AND TRADEMARKS Washington, D.C. 20231

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Please find below a communication from the EXAMINER in charge of this application.

Commissioner of Patents

Attached hereto is a "Supplement to Interview Summary" concerning the February 11, 2003 interview for Serial Nos. 09/501,622; 09/678,730; 09/009,837; 09/110,678; 09/111,160; 09/362,693; 09/009,455; 09/669,877; 09/111,003; 09/501,621; 09/225,687; 10/076,590; and 09/813,792.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Wayne A. Langel whose telephone number is (703) 308-0248. The examiner can normally be reached on Monday through Friday from 8 A.M. to 3:30 P.M.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Stanley Silverman, can be reached on (703) 308-3837. The fax phone number for this Group is (703) 305-7718.

Serial No. 09/362,693

-2-

Art Unit 1754

Any inquiry of a general nature or relating to the status of this application or proceeding should be directed to the Group receptionist whose telephone number is (703) 308-2351.

WAL:cdc February 20, 2003

Supplement to Interview Summary

The following is a supplement to the summary concerning the February 11, 2003 interview re 09/501,622, etc. The attendees were Mr. Melcher, Examiner Langel, Examiner Kalafut, Dr. Mills, Mr. Simenauer, SPE Stanley Silverman, SPE Pat Ryan, Congressional Aid Ted Liu, Mr. Brewer, Examiner Wayner, and QAS Douglas McGinty. A two-page Interview Summary was provided by Examiner Langel. A two page "Attachment to Interview Summary Form" also was provided by Mr. Simenauer. While the Attachment may represent the applicant's understanding of the interview, two points must be clarified.

First, the second page of the applicant's attachment states in part: "For those claims that are supported by the data, the PTO agrees to issue those claims." The PTO made no such agreement. Instead, the PTO representatives indicated that the rejections under both 35 USC 101 and 112, 1st para., are outstanding and that evidence as to verification by credible, established, independent third parties would carry more persuasive weight.

Second, QAS Douglas McGinty was not listed in the Examiner's Interview Summary. He was present during the interview with the aforementioned attendees.

Wayne Langel Primary Examiner Art Unit 1754

WAYNE A LANGEL PRIMARY EXAMINER



FEB 20 2003

Commissioner for Patents Washington, DC 20231 www.uspto.gov

Dear Patent Business Customer:

The United States Patent and Trademark Office ("Office") is now permitting and encouraging applicants to voluntarily submit amendments in a revised format as set forth in AMENDMENTS IN A REVISED FORMAT NOW PERMITTED, _____ Off. Gaz. Pat. Office __ (February 25, 2003), currently available on the USPTO web site at http://www.uspto.gov/web/offices/pac/dapp/opla/preognotice/revamdtprac.htm. The revised format permits amendments to the specification and claims to be made in a single marked-up version; the requirement for a clean version is eliminated. Attached, you will find a flyer with information and instructions regarding the procedures to be used to comply with the revised format. The flyers are being inserted with out-going Office actions mailed during the period of February 20, 2003 - March 31, 2003.

The revised amendment format is essentially the same as the amendment format for the specification, claims, and drawings that the Office is considering adopting via a revision to 37 CFR 1.121 (Manner of Making Amendments). The revision to 37 CFR 1.121 (if adopted) will simplify amendment submission and improve file management. This proposed revision and others necessary to facilitate a gradual transition to the use of an Electronic File Wrapper (EFW) will be set forth in a Notice of Proposed Rule making (NPR), expected to be published by March 2003. After consideration of public comments, the Office anticipates adopting a revision to § 1.121, following publication of a Notice of Final Rule making (NFR), expected by June 2003, at which point compliance with revised § 1.121 will be mandatory.

The Office will continue to accept your amendment submissions in the revised format during the voluntary period, which will extend up to the effective date of final revisions to § 1.121. The Office also encourages your feedback on the proposed revised amendment format and other changes set forth in the NPR, expected to be published by March 2003.

For assistance: Any questions regarding the submission of amendments pursuant to the revised practice should be directed to Office of Patent Legal Administration (OPLA), Legal Advisors Elizabeth Dougherty (Elizabeth.Dougherty@uspto.gov), Gena Jones (Eugenia.Jones@uspto.gov) or Joe Narcavage (Joseph.Narcavage@uspto.gov). Alternately, you may send e-mail to "Patent Practice", the OPLA e-mail address that has been established for receiving queries and questions about patent practice and procedures or telephone OPLA at (703) 305-1616.

Micholas P. Godici

Commissioner for Patents

Attachment: Flyer entitled: Revised Notice* AMENDMENTS MAY NOW BE SUBMITTED IN REVISED FORMAT



UNITED \$ DEPARTMENT OF COMMERCE Patent and 1- ad therk Office Address COMMISSIONER OF PATENTS AND TRADEMARK Weshington, D.C. 20231

APPLICATION NUMBER	FILING DATE	FIRST NAMED APPLICANT	ATTOR	IEY DOCKET NO.
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FORM **PTOL-413** (REV. 2-98)

FARKAS & MANELLI PLLC ATTORNEYS

February 28, 2000

VIA HAND-DELIVERY

Ms. Esther Kepplinger Director of Group 1700 United States Patent & Trademark Office Washington, D.C. 20231

Re: Improper Withdrawal From Issuance of U.S. Patent Application Ser. No. 09/009,294

Dear Ms. Kepplinger:

This letter is a follow-up to our telephone conversations of last week concerning recent actions taken by the U.S. Patent and Trademark Office, which, as indicated in the attached February 17, 2000 Notice from the Office of Petitions, has resulted in the withdrawal from issuance of Patent Application Ser. No. 09/009,294. This application was due to issue as U.S. Patent No. 6,030,601 on February 29, 2000.

As I understand it, these actions were based on U.S. Patent Office concerns that the technology developed by inventor Dr. Randell L. Mills and disclosed in the subject patent application, and perhaps in other allowed applications and a prior issued patent of Mills, represents "unproven science," such as "cold fusion." I am writing to allay those concerns and to assure you that they are unfounded inasmuch as this technology has been subject to extensive testing and proven beyond argument to work. The results of that testing have already been presented and positively considered by the U.S. Patent Office and embraced by highly reputable companies, not to mention the U.S. Navy and the American Chemical Society.

Before proceeding any further, let me just say that I appreciate the courtesy you extended in taking my calls inquiring into this matter and the circumstances surrounding this rather unusual turn of events. I gathered from your comments that you share my desire to resolve this matter as directly and expeditiously as possible, and it is my sincere hope that this letter, as the first step in that process, will convince you that there is no need for further examination of the '294 patent application and that it should be immediately allowed to issue.

As I stated during our conversations, this application, as well as the other allowed Mills applications assigned to my client, Blacklight Power Inc., represents a significant advance in the

Ms. Esther Kepplinger, Dir. 1766 February 28, 2000 Page 2 of 5

chemical arts. The underlying technology disclosed in these applications is the culmination of over ten years of research and the expenditure of over ten million dollars invested by well-known companies, such as AMP Corporation, Connectiv, and PacificCorp, companies that would not dare risk their business reputations on "unproven science."

To be sure, Dr. Mills' technology has undergone rigorous testing by over 25 well-known independent laboratories and has been shown to be based on sound scientific principles and, more importantly, shown to work precisely as described in Mills' '294 patent application. Based on his startling discoveries, Dr. Mills was bestowed the honor of addressing the October 1999 meeting of the American Chemical Society (ACS) in California, during which he presented to an enthusiastic and receptive audience the test results for the very compounds disclosed and claimed in that application. Also a featured speaker at this meeting was Dr. Johannes Conrads, retired Director and Chairman of the Board of the Institute for Low Temperature Plasma Physics at Ernst Moritz Arndt University in Greifswald, Germany. Dr. Conrads, considered by many to be one of Germany's top physicists, tested the Mills technology himself and reported to the ACS that it produced an energetic plasma in hydrogen with no power input, conclusively demonstrating a new source of chemical energy from hydrogen never before seen. Dr. Conrads, and the four other top scientists who assisted in this testing, would not put their professional reputations in jeopardy for the sake of "unproven science."

These positive test results also have not escaped the attention of the U.S. Government. Following a thorough review, the United States Navy has taken affirmative steps to develop applications based on the Mills technology in cooperation with Blacklight Power.

In view of the allowance of this and other patent applications of Dr. Mills, the issuance of U.S. patent No. 6,024,935 to Dr. Mills, and other highly-desirable commercial applications of the Mills technology, Blacklight Power's management has committed to the process of going public and has limited its choice of underwriter to either Morgan Stanley or Goldman Sachs, two of Wall Street's top investment firms who also share an interest in carefully guarding their business reputations. Indeed, this process is now in the latter stages, with the filing statement for the IPO scheduled for late March. The market capitalization for this public offering is expected to exceed one billion dollars based on current market conditions. Blacklight Power's current private market capitalization is already in excess of 340 million dollars, based on the last private placement that was oversubscribed.

This enthusiastic public response to Blacklight Power and the revolutionary technology it developed did not just happen by chance. The company has been built upon a rock solid foundation of top-notch scientists and leaders in chemistry and physics. Included among the distinguished board members of Blacklight Power are: Dr. Shelby T. Brewer, M.S. and PhD. degrees from MIT in Nuclear Engineering, former Assistant Secretary of the Department of Energy and former Chief Executive Officer of Combustion Engineering's Nuclear Business; George A. Sawyer, former Assistant Secretary of the Department of Navy; David Blake presently with Connectiv and formerly a top manager with Du Pont and Hurcules Chemical Specialties

Ms. Esther Kepplinger, Dir. 1709 February 28, 2000 Page 3 of 5

Company; and Michael P. Kalleres, former President and CEO of Global Associates, Ltd., Technology Services Group, and retired Vice Admiral from the U.S. Navy, currently serving on the Defense Science Board, the Naval Studies Board of National Academy of Science, and the Dean's Advisory Council of Purdue University. Furthermore, many of the shareholders of Blacklight Power are Phd. chemists and physicists. Certainly, the U.S. Patent Office does not believe that this impressive list of PhD. chemists and physicists associated with Blacklight Power would waste their money and efforts on "unproven science."

No doubt, therefore, you can appreciate the significant negative impact the PTO's withdrawal of the '294 patent application from issuance has had not only on Blacklight Power, but on many other players in the industry, including the U.S. Government, who have a vested interest in seeing that the Mills technology is not just commercially developed, but also adequately protected against piracy. Thus, you can understand my utter dismay when you informed me that this application had been "pulled" based on some perceived "heat" (from an undisclosed source) without reviewing the file history. As with any revolutionary technology, such negative reactions should not be surprising and, indeed, should be expected. I would hope that the Patent Office would not act "willy-nilly" upon some unfounded conclusions drawn without adequate evidentiary basis.

I was also disturbed by Director Robert Spar's comment to me that he directed Petitions Examiner Frances Hicks to issue the petition to withdraw the subject patent application from issuance based on the premise that the underlying technology involved "cold fusion." With all due respect, that assertion is baseless and utter nonsense since the subject patent application is directed to chemical compositions of stable matter rather than a nuclear reaction process. The distinction between stable chemical compounds and a nuclear reaction process should be obvious to any competent chemist and such a determination was in fact made by the U.S. Patent Office.

One such competent chemist, Primary Examiner Steven Kalafut, evaluated over 130 published "cold fusion" articles during prosecution of the subject patent application, as evidenced by the extensive initialed Form PTO/SB/08A and B documents, and it was certainly clear to him that the subject application is not related to cold fusion. Examiner Kalafut was advised by the undersigned during a personal interview that these immaterial "cold fusion" publications were being submitted in the subject application only because they were previously cited by Examiner Harvey Behrend of Group 3641 in an earlier application by Dr. Mills. Steven Kalafut also withdrew a Section 101 rejection of the subject application based on inoperability after Dr. Mills personally submitted convincing experimental evidence by unbiased third party physicists and chemists that the subject patent application is operable.

Another competent chemist, Primary Examiner Wayne Langel, also examined the over 130 published "cold fusion" articles during prosecution of another patent application and allowed that application to issue as U.S. Patent No. 6,024,935. Examiner Langel was also advised by the undersigned during a personal interview that these immaterial "cold fusion" publications were

Ms. Esther Kepplinger, Dir. 1700 February 28, 2000 Page 4 of 5

being submitted only because they were previously cited by Examiner Harvey Behrend of Group 3641 in an earlier application by Dr. Mills.

The '935 patent, prior to issuance, is believed to have been subject to another level of review and approved by the Office of Patent Quality Review. This belief is based on the fact that the application was sent back to Examiner Langel to correct a very minor mistake in claim 304, line 1 to replace "304" with -- 303 -- after the application was forwarded to the Patent Publication Branch. Furthermore, the patent issued more than ten months after payment of the issue fee, allowing more than sufficient time for U.S. Patent Office to review the '935 patent before issuance.

I must say that I was also somewhat taken aback by your statement that you had no evidence that the invention disclosed in the subject '294 application was inoperable. In spite of this lack of evidence, you also stated that you believed the invention was inoperable because you learned in a textbook that "atomic hydrogen" cannot go below the "ground state." We acknowledge that atomic hydrogen having the ground state of 13.6 eV can only exist in a vacuum or in isolation, and that atomic hydrogen cannot go below this ground state in isolation. However, please keep in mind that there is no known composition of matter containing hydrogen in the ground state of 13.6 eV. When hydrogen reacts with another element, it goes to a lower energy state. Dr. Mills has discovered new compositions of matter containing hydrogen at new lower energy levels, which lower energy levels are achieved using the novel catalysts disclosed in the subject patent application. Over forty new compounds have been produced using Dr. Mills technology which exhibit novel, commercially valuable properties. The existence of the new lower energy level hydrogen has been established by well known analytical chemistry methods including Nuclear Magnetic Resonance Spectroscopy, Time of Flight Secondary Ion Mass Spectroscopy, and X-Ray Photoelectron Spectroscopy conducted by unbiased third parties. Primary Examiners Kalafut and Langel have fully evaluated this extensive experimental data.

To distinguish the new lower energy level hydrogen from conventional energy level hydrogen, Dr. Mills has named the new lower energy level hydrogen "hydrinos." "Hydrino" is latin for smaller or tighter bound hydrogen. The subject patent application describes and claims novel chemical compositions of matter comprising hydrinos. Please be assured that absolutely no nuclear "cold fusion" reactions are occurring in the formation of the hydrinos.

The U.S. patent system worked precisely as intended in the issuance of U.S. Patent No. 6,024,935 and the Notice of Allowances in five U.S. patent applications of Dr. Mills, including the subject application. The issued '935 patent and the five allowed patent applications were objectively and fairly examined by experienced Primary Examiners Kalafut and Langel on all of the surrounding facts, including "cold fusion" accusations. When I inquired about the '935 patent and these other allowed applications, Director Spar also informed me that the '935 patent will most likely be Reexamined by the U.S. Patent Office and petitions for withdrawal from issuance will be filed in the other four allowed applications of Dr. Mills. To overturn the objective examination of these applications by two experienced, chemical Primary Examiners

Ms. Esther Kepplinger, Dir. 1700 February 28, 2000 Page 5 of 5

based on a whim and unsubstantiated "cold fusion" accusations by unnamed parties undermines the integrity of the U.S. Patent Office and, indeed, the entire U.S. patent system.

In an effort to better understand the underlying basis for the PTO's actions and to bring this matter to a swift conclusion, we respectfully request a meeting with you and whoever else you deem to be appropriate, to discuss this matter further before any Office Actions are issued in the subject '294 patent application or in any other presently allowed application, and before any Reexamination of the '935 patent that would drag this matter out before the public.

Since the U.S. Patent Office was unable to locate a copy of the prosecution history for the subject patent application as of February 25, 2000, more than one week after Ms. Hicks signed the petition, we have enclosed a courtesy copy of our prosecution file history for your review in this matter.

Thank you for your attention to this matter and we look forward to your prompt reply.

Sincerely yours.

Jeffrey S. Melcher Reg. No. 35,950

Tel. No.: 202.261.1045

Attachments

Cc: The Honorable Todd Dickinson - Commissioner of Patents Robert Spar - Director of Special Programs Francis Hicks - Petitions Examiner Stephen Kalafut - Primary Examiner Group 1700 Wayne Langel - Primary Examiner Group 1700



PARTMENT OF COMMERCE UNITED STAT ark Office Patent and Traus ASSISTANT SECRETARY AND COMMISSIONER OF PATENTS AND TRADEMARKS Washington, D.C. 20231 FMH.2

Paper No.

FARKAS & MANELLI, PLLC 2000 M STREET NW 7TH FLOOR WASHINGTON, DC 20036-3307

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FEB 1 7 2000

SPECIAL PROGRAMS OFFICE DAC FOR PATENTS

NOTICE

In re Application of Randell L. Mills Application No. 09/009,294 Filed: January 20, 1998 Attorney Docket No. 911319

The purpose of this communication is to inform you that the instant application, which has received Patent No. 6,030,601 and an issue date of February 29, 2000, is being withdrawn from issue pursuant to 37 CFR 1.313.

The application is being withdrawn to permit reopening of prosecution. This withdrawal was requested by the Director, Special Program Law Office.

The issue fee is refundable upon written request. However, if the application is again found allowable, the issue fee can be applied toward payment of the issue fee in the amount identified on the new Notice of Allowance and Issue Fee Due upon written This request and any balance due must be received on or before the due date noted in the new Notice of Allowance in order to prevent abandonment of the application.

This application, upon receipt in the Office of Petitions, will be forwarded to Technology Center AU 1745 for reopening of prosecution.

Telephone inquiries concerning this matter may be directed to the undersigned at (703) 305-8680.

Petitions Examiner Office of Petitions

Office of the Deputy Assistant Commissioner

for Patent Policy and Projects



UNITED STATED DEPARTMENT OF COMMERCE
Patent and Tracemark Office
ASSISTANT SECRETARY AND COMMISSIONER

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PARKAS & MANELLI PLLC 2000 M STREET NW 7th FLOOR WASHINGTON DC 20036-3307

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Paper No. 26

MAR 2 2 2000

SPECIAL PROGRAMS OFFICE DAC FOR PATENTS

In re Application of Mills et al. Application No. 09/009,294 Filed: January 20, 1998 For: HYDRIDE COMPOUNDS

DECISION ON PETITION

This is in response to three communications submitted on February 28, 2000, regarding the application No. 09/009,294, requesting that the Commissioner review the action of the Director, Special Programs Law Office, with respect to the withdrawal of this application from issue. Although the three letters fail to clearly identify the submissions as a formal petition under 37 CFR 1.181 requesting the Commissioner to invoke his supervisory authority, the submissions are being treated as a single petition under 37 CFR 1.181(a)(3). The three letters are: (1) a February 28, 2000, letter to the Commissioner; (2) a February 28, 2000, letter to Director Spar; and (3) a February 28, 2000, letter to Director Kepplinger.

The petition is denied.1

BACKGROUND

A Notice of Allowance and Issue Fee due was mailed in the aboveidentified application October 18, 1999, which set a statutory period of three months to pay the issue fee.

On October 22, 1999, the PTO processed applicant's issue fee payment, and the application in due course was assigned a patent No. (6,030,601) and an issue date of February 29, 2000.

On February 15, 2000, U.S. Patent No. 6,024,935 (the `935 patent), titled "Lower Energy Hydrogen Methods and Structures," issued to the assignee Blacklight Power, Inc., which patent named Randell Mills et al. as the inventors.

¹ This decision may be viewed as a final agency action within the meaning of 5 U.S.C. § 704 for purposes of seeking judicial review. See MPEP 1002.02.

On February 17, 2000, the Director of the Technology Center (Director) which had examined the application that issued as the '935 patent, learned that the '935 patent had issued.

Shortly thereafter, upon inspecting the '935 patent, the Director read, inter alia, that the invention therein was asserted to relate to the discovery that energy was released by stimulating hydrogen atoms to relax, and, in so doing, to shrink to smaller radii, and to also attain energy levels below their "ground state" according to a "novel atomic model." The Director was immediately struck by the assertion that the electron of a hydrogen atom could attain an energy level and orbit below the "ground state" corresponding to a fractional quantum number because such an assertion did not conform to the known laws of physics and chemistry. The Director was immediately aware that any pending application embodying such a concept raise a substantial question of patentability of one or more claims which would require reopening prosecution.

The Director further became aware that another pending application that embraced the above-noted contradiction to the known laws of chemistry and physics, was application 09/009,294 and that application was scheduled to issue as a patent on February 29, 2000.

In response to a request for prompt assistance from the Director in ensuring that the patent would not issue, the Director, Special Programs Law Office (SPLO) requested that the above-identified application be withdrawn from issue under 37 CFR 1.313 by the Office of Petitions, which resulted in the Notice to applicant mailed February 17, 2000.

Due to the lateness of the request of the Director, the PTO could not prevent the previously scheduled publication of the specification in the February 29, 2000, Official Gazette.

Nevertheless, as the Notice of February 17, 2000, indicated that this application had been withdrawn from issue, the patent did not issue on February 29, 2000. See Harley v. Lehman, 981 F. Supp. 9, 44 USPQ2d 1699 (D.D.C. 1997). As is usual in such instances, an erratum notice was published in the Official Gazette on March 14, 2000.

STATUTE, REGULATION, AND EXAMINING PROCEDURE

35 U.S.C. § 6(a) provides, in part, that:

The Commissioner . . . may, subject to the approval of the Secretary of Commerce, establish regulations, not inconsistent with law, for the conduct of proceedings in the Patent and Trademark Office.

35 U.S.C. § 131 states:

The Commissioner shall cause an examination to be made of the application and the alleged new invention; and if on such examination it appears that the applicant is entitled to a patent under the law, the Commissioner shall issue a patent therefor.

37 CFR 1.313 states that:

- (a) Applications may be withdrawn from issue for further action at the initiative of the Office or upon petition by the applicant. Any such petition by the applicant must include a showing of good and sufficient reasons why withdrawal of the application is necessary and, if the reason for the withdrawal is not the fault of the Office, must be accompanied by the fee set forth in § 1.17(i). If the application is withdrawn from issue, a new notice of allowance will be sent if the application is again allowed. Any amendment accompanying a petition to withdraw an application from issue must comply with the requirements of § 1.312.
- (b) When the issue fee has been paid, the application will not be withdrawn from issue for any reason except:
 - (1) A mistake on the part of the Office;
 - (2) A violation of § 1.56 or illegality in the application;
 - (3) Unpatentability of one or more claims;
 - (4) For interference; or
 - (5) For abandonment to permit consideration of an information disclosure statement under § 1.97 in a continuing application.

MPEP 1201 states in pertinent part that:

The Patent and Trademark Office in administering the Patent Laws makes many decisions of a discretionary nature which the applicant may feel deny him or her the patent protection to which he or she is entitled. The differences of opinion on such matters can be justly resolved only by prescribing and following judicial procedures. Where the differences of

opinion concern the denial of patent claims because of prior art or material deficiencies in the disclosure set forth in the application, the questions thereby raised are said to relate to the merits, and appeal procedure within the Patent and Trademark Office and to the courts has long been provided by statute.

The line of demarcation between appealable matters for the Board of Patent Appeals and Interferences (Board) and petitionable matters for the Commissioner of Patents and Trademarks should be carefully observed. The Board will not ordinarily hear a question which it believes should be decided by the Commissioner, and the Commissioner will not ordinarily entertain a petition where the question presented is an appealable matter.

OPINION

Petitioner asks that the Commissioner intervene and consider the instant petition. As to the merits of the petition, petitioner contends that the withdrawal from issue was a clear error as authorized by the Director of the Special Programs Law Office, and points to the communication addressed to the Director of Technology Center 1700 which accompanies the petition in support of his assertions. Petitioner's short letters to the Commissioner and Director Spar appear to rest on the theory that no new issue of patentibility arose. As noted below, this argument is without merit. The letter to Director Kepplinger, which accompanied the two former letters, merely requests a meeting with PTO personnel to discuss the application that was withdrawn.²

The decision of the Director to request withdrawal from issue to reopen prosecution of this application did not constitute either the rejection of a claim or a decision adverse to the ultimate patentibility of a claim. See In re Voss, 557 F.2d 812, 816, 194 USPQ 267, 270 (CCPA 1977). The PTO will issue in due course either a supplemental notice of allowance or an office action rejecting the claims. If the claims are rejected, Petitioner will then have a full opportunity to rebut the PTO's decision, including ultimately an appeal on the patentibility merits to the Board of Patent Appeals and Interferences.

In the time period between submission of the petition and this decision, petitioner has been offered an opportunity to provide whatever information it chooses to submit to the PTO at an on-the-record Office Interview. However, petitioner has refused to participate in such a meeting although such a meeting was requested by petitioner.

While it is understandable that petitioner is concerned about the withdrawal from issue of the above-identified application, the record does not show that the SPLO has acted beyond the scope of its authority in promptly assisting with the request from the Director to secure the withdrawal of this application from issue, or, based on that request, authorizing the Notice of February 17, 2000, for the Technology Center's purpose of reopening prosecution. Rather, that assistance is specifically within the SPLO's purview.

Section 1.313(b) of 37 CFR specifically authorizes the PTO to withdraw an application from issue to reopen prosecution. See Harley v. Lehman, 981 F. Supp. 9, 11-12, 44 USPQ2d 1699, 1701-02 (D.D.C. 1997) (applications may be withdrawn from issue even after payment of the issue fee in situations wherein the Group Director seeks to reopen prosecution). The withdrawal Notice of which petitioner complains merely apprised petitioner of the fact of withdrawal, and further, served the purpose of returning jurisdiction of the application to the Technology Center. See MPEP 1302.

In reaching her decision, the Director read the specification of the '935 patent and noted, inter alia, that the shrunken, lower energy hydrogen atoms or "hydrinos," are asserted in the '935 patent to react with other atoms, such as those of metals, to produce hydrides, which are the compounds claimed in the application at issue. The principles set forth in the '935 patent are not known to the Director to be generally recognized by the scientific community, but rather, are indicated in the '935 patent to be the discovery of one of the above-named inventors who asserted to have built further on quantum mechanics and derived a new atomic theory based on "first principles." The '935 patent further claims that its "novel theory . . . unifies Maxwell's Equations, Newton's Laws, and Einstein's General and Special Relativity."

The concept that hydrinos can be created by hydrogen atoms relaxed to below their "ground state," was recognized by the Director not to conform with the known laws of chemistry and physics that are embraced by the scientific community. This lack of compliance with the known laws of chemistry and physics reasonably caused the Director to request withdrawal from issue of the instant application due to the Director's determination that one or more claims lacked patentability.

In its petition, petitioner refers to its invention as "revolutionary technology."

Furthermore, an inspection of Application No. 09/009,294 reveals that this invention is asserted to matters containing fractional quantum numbers. Such fractional quantum numbers do not conform to the known laws of physics and chemistry. For instance (1) page 5, lines 10-20, (2) page 11, lines 14-30, (3) page 68, lines 21-35, and (4) claim 17, all pertain to fractional quantum numbers which are not known to conform to the known laws of physics and chemistry.

The application did not issue as a patent on February 17, 2000, and thus, it did not enjoy the statutory presumption of validity, including operability, that is reserved only for an issued patent, when the Director requested withdrawal from issue. See 35 U.S.C. § 282. As such, the Director was not prohibited from determining anew that the technology embraced by the instant application lacked patentability of one or more claims.

That is, in light of (1) the application pertains to the field of chemistry (see title: "Hydride Compounds") which is often unpredictable, (2) the statement noted above by the Director which pertains to how these compounds are produced by a chemical reaction involving a hydrogen atom in a state that is not recognized by the scientific community which (3) the Director discerned was, on its face, contrary to generally accepted scientific principles, the reasonableness of the Director's decision to request withdrawal from issue to reopen prosecution is apparent. See In re Marzocchi, 439 F.2d 220, 223, 169 USPQ 367, 369-370 (CCPA 1971):

In the field of chemistry generally, there may be times when the well-known unpredictability of chemical reactions will alone be enough to create a reasonable doubt as to the accuracy of a particular broad statement put forward as enabling support for a claim. This will especially be the case where the statement is, on its face, contrary to generally accepted scientific principles.

<u>See also In re Chilowsky</u>, 229 F.2d 457, 462, 108 USPQ 321, 325 (CCPA 1956):

Thus, in the usual case where the mode of operation alleged can be readily understood and conforms to the known laws of physics and chemistry, operativeness is not questioned, and no further evidence is required. On the other hand, if the alleged operation seems clearly to conflict with a recognized scientific principle as, for example, where an applicant purports to have discovered a machine producing perpetual motion, the presumption of inoperativeness is so strong that very clear evidence is required to overcome it.

Further, while petitioner complains that the Notice of February 17, 2000, does not set forth any "new" issues of mistake, violation of 37 CFR 1.56, or unpatentabilty of one or more claims, in support of the withdrawal, 37 CFR 1.313 does not require the issue(s) be "new" for the Director's request for withdrawal from issue to be proper. Petitioner assumes that once a single PTO employee agrees with an applicant, even erroneously, no further review within the PTO is warranted or legally possible. Such a belief is without merit. For example, an examiner is not precluded from reopening prosecution to reinstate a rejection that had been made earlier in prosecution and withdrawn. See In re Freeman, 166 F.2d 178, 180, 76 USPQ 585, 586 (CCPA 1948). See also 37 CFR 1.196(b) (Board of Patent Appeals and Interferences may enter grounds of rejection not contained in the examiner's final rejection when applicant appeals final rejection).

While petitioner in the accompanying letter points to favorable testimonials from scientists and entrepreneurs regarding the "revolutionary technology" that the instant application is asserted to embody, this does not establish that either the Director, Technology Center 1700, or the Director, Special Programs Law Office, committed reversible error, nor that the Notice should be withdrawn. In contrast, mainstream newspapers have reported this same "revolutionary technology" is accompanied by controversy in the scientific community. See Baard et al., Scientists and entrepreneurs have lots of ideas about new sources of energy; some may even be practical, Wall St. J., Sept. 13, 1999, at R16; Park, Perpetual motion: still going around, Washington Post, Jan. 12, 2000, at H3.

The PTO has an obligation to issue patents that meet the statutory requirements for patentibility. 35 U.S.C. § 131. See also In re Schmidt, 377 F.2d 639, 641, 153 USPQ 640, 642 (CCPA 1967); Markman v. Westview Instruments, Inc., 52 F.3d 967, 985

In <u>Freeman</u>, the reopening of prosecution set forth, *inter alia*, a ground of rejection (double patenting) that had been made earlier in prosecution, but had not been repeated in the final rejection, and, as such, was not an issue considered in the first appeal. After this rejection was affirmed by the Board of Appeals in the second appeal, counsel for Freeman argued unsuccessfully to the court that the circumstances suggested that this ground of rejection had not initially been repeated due to its "doubtful propriety." The CCPA noted that the rejection was nevertheless properly before it for consideration on the merits, and likewise affirmed. <u>Id</u>.

n.14, 34 USPQ2d 1321, 1334 n.14 (Fed. Cir. 1995), aff'd, 116 S. Ct. 1384, 38 USPQ2d 1461 (1996). It would be contrary to sound public policy for the PTO to issue a possibly invalid patent. See Harley, 44 USPQ2d at 1701. When, as here, a "revolutionary technology" has been reported in the public record as being viewed with skepticism by two physicists of repute (including the 1997 Nobel co-laureate in physics, see Baard et al.) and further, another professor of physics (see Park) publicly asserts that such "revolutionary technology" does not conform with the known laws of physics and chemistry, it is reasonable for the PTO to withhold issuance to ensure that all the statutory requirements for a patent have been herein met.

While petitioner points to U.S. Patent No. 6,024,935 recently issued to Mills, the law is well settled that the issuance of that patent cannot operate to discharge the PTO's obligation with respect to the patentibility vel non of the instant application.

See In re Margaroli, 318 F.2d 348, 138 USPQ 158 (CCPA 1963); In re Wright, 256 F.2d 583, 118 USPQ 287 (CCPA 1958); In re Launder, 212 F.2d 603, 101 USPQ 391 (1954). Rather, such issuance is immaterial to, and does not undermine, the reasonableness of the request of the Director to seek withdrawal from issue to permit reopening of prosecution, see In re Giolito, 530 F.2d 397, 188 USPQ 645 (CCPA 1976), or the reasonableness of the action of the SPLO in implementing that request.

This conclusion of reasonableness on the part of the PTO vis-a-vis patentability is reinforced by the controversy surrounding this allegedly "revolutionary technology." As the PTO examines applications which embrace almost every field of endeavor, it is reasonable for the PTO to take appropriate steps to satisfy itself in the first instance, especially when a controversial "revolutionary technology" is involved, that the statutory requirements pertaining to the issuance of patents have been met. See generally Newman v. Quigq, 877 F.2d 1575, 11 USPQ2d 1340 (Fed. Cir. 1989); Ex parte Dash, 27 USPQ2d 1481 (BPAI 1992).

DECISION

A review of the record indicates that the Director, Special Programs Law Office, and the Director, Technology Center 1700, did not act improperly in withdrawing the application from issue. For the foregoing reasons, the withdrawal of the application from issuance is appropriate.

As such, the Notice of February 17, 2000, will not be rescinded. The above-identified application remains withdrawn from issue. An Office Action addressing the merits of the application or a supplemental Notice of Allowance will issue in due course.

This decision, as with all petitionable procedural matters, does not relieve or suspend applicant's obligation to continue prosecuting the patent application. 37 CFR 1.181(f) ("The mere filing of a petition will not stay the period of reply to an Examiner's action which may be running against an application, nor does it act as a stay of other proceedings."). In this application, no time limit is currently pending against applicant.

Stephen G. Kunin

Deputy Assistant Commissioner for

Patent Policy and Projects

+

Home Book Notes Concepts

Mission Statement

Essays The mission of all discussion within the Hydrino Study FAQS Group (HSG) is to determine whether classical physica Lab Reports laws describe reality on all scales.

Members
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Patents
Press
Rules

Search



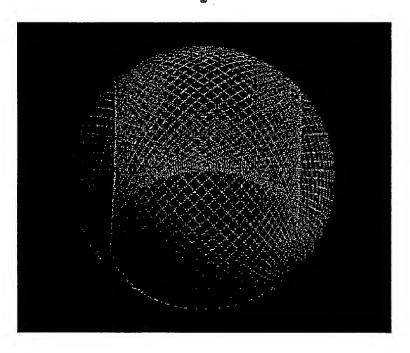
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In This Corner	In This Corner
The Reigning Champion	The Contender
Weighing in at Millions of Pages	Weighing in at <i>Thousands</i> of Pages
Standard Quantum Mechanics	Classical Quantum Mechanics
"By rejecting such elementary	-

concepts as renormalization, virtual photons, virtual annihilation and creation, and even propagator theory ... Mills places himself squarely in opposition to the greatest theoretical minds and experimental physicists of mid- and late twentieth century physics. ... If that troubles you guys, I'm sorry. But reality is the readings on my instruments--period." --Dr. Peter Zimmerman

"A theory of physics must be based on directly measurable physical laws--period."

--Dr. Randell Mills



The orbitsphere represents the fundamental concept of Dr. Randell Mills'
Grand Unified Theory of Classical Quantum Mechanics
(GUTCQM)

Note:

This entire theory makes one central but tenuous assumption that the free electron is an extended, internally fluidized, two-dimensional "disk" particle with a radius comparable to that of a hydrogen atom. Click here for an AV animation of this concept. We are looking for experimental evidence to corroborate or refute this assumption. An inarguable refutation would destroy the entire theory, although the laboratory data may still require new physics

to explain. Otherwise, the theory remains arguably true to some degree.

Theory in a Nutshell

Dr. Mills unifies the theories of Bohr, de Broglie, Maxwell, Einstein, Newton, etc via a new insight into the nature of the atom. Mills takes advantage of a 1986 Herman Haus paper that explains how charged particles may undergo acceleration without radiation. He then applies the mathematics of this insight into a new analysis of the hydrogen atom. His new model treats the electron, not as a point nor as a probability wave, but as a dynamic two-dimensional spherical shell surrounding the nucleus. The resulting model, called the "orbitsphere", provides a fully classical physical explanation for phenomena such as

- 1. Quantization
- 2. Angular momentum
- 3. Bohr magneton

Essentially, the electron orbitsphere is a "dynamic spherical resonator cavity" that traps photons of discrete frequencies. Broader implications of GUT-CQM include the possibility of catalytically shrinking the hydrogen atom to below "ground state, releasing useful energy in the process. Unification of the electron orbitsphere radius formula with General Relativity (GR) provides a quantum explanation for gravity as well. This leads to a novel explanation for the recently observed accelerating expansion of the cosmos.

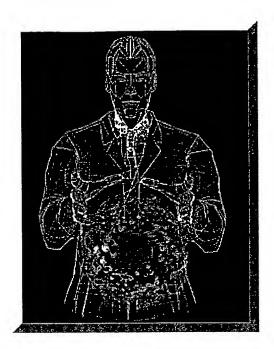
- ▶ To learn more about this radical new theory and its experiments and validations, visit the <u>BlackLight Power</u> home page. Pay close attention to the *free* book you may download from there! Note the many lab report available there as well.
- To read many arguments for and against this theory, check out the message archives of the Hydrino Study Group e-mail list, established in March 2000.



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"The person who says it cannot be done should not interrupt the person doing it."

--Chinese Proverb

There have been hits to this page since September 25, 2000.

Disclaimer: The author of this page is neither an employee nor an investor in Dr. Randell Mills' company, BlackLight Power Inc. His interest in Dr. Mills' work is strictly intellectual.

Web server space for this site was generously donated by <u>The Frontier</u>. This page was last updated 2001-08-10.

Jeffrey S. Melcher

From:

<Tstolper@aol.com>

To:

<hydrino@yahoogroups.com>

Sent:

Saturday, November 01, 2003 12:13 PM

HSG: Re: Zimmerman's APS Centennial Meeting Talk Subject:

Peter Zimmerman ended his message 7437 dated October 29, 2003, by writing:

"If Mr. Stolper wants to discuss technical issues instead of ancient history, perceived slights, and personalities, I'm here waiting."

I've been waiting for a long time. In the two-and-a-half years since Zimmerman joined the HSG, I have learned nothing from him about the scientific or technical aspects of Mills' work. To the contrary, Zimmerman has been a fountain of confusion and disinformation about Mills' work.

We all make mistakes, but where Mills and BLP and their work are concerned, Zimmerman's "mistakes" are too many and too important to be accidental.

Nonetheless, I believe Peter when he says that he had no direct connection with the withdrawal from issue of the BLP chemical patent applications in February 2000. My principal suspect would be Robert Park, acting through an acquaintance in the Commerce Department, which had jurisdiction over the Patent Office. Others may also have been involved, and someday, we may learn who they were.

That said, I think Peter did contribute to the atmosphere surrounding the withdrawal from issue of the BLP chemical patent applications, an atmosphere in which there was a false presumption, created in part by Peter, that Mills and BLP were a bunglers at best and charlatans at worst.

Peter wrote in his message 7437: "I did discuss RLMMD at modest length in Atlanta, along with PAGD (sorry Malagosia), n-rays, zeropoint energy, the "US antigravity squadron", CF/LENR/CANR and a bunch of other silly ideas, probably including Joe Newman." That is not company in which any working scientist would want to appear, especially one with a family.

In the penultimate paragraph of his message 7437, Zimmerman mentioned that he gives a lot of talks and that it all runs together. Peter does sometimes dimly see that there's something different about Mills, but Peter can't clearly distinguish him from the no-hopers, and doesn't want to. Because of the often influential nature of the audiences that Peter speaks to, that isn't just his problem.

Zimmerman has also been trying to spread the false impression that Mills is litigious, because I think Peter well knows that no one wants anything to do with litigious people. My impression is that scientists in particular are scared of litigiousness, more so than business people for example, because in the scientific community, though battles may be hard fought and hard words often exchanged, it rarely comes down to a lawsuit.

In his message 7437, Zimmerman used some harsh words indeed, as he has before: "Randell Mills's thugs," "BLP goon squad," "goons," "bully," "willing to go quite far in general thuggery." If this is what Zimmerman writes in a semipublic forum like the HSG, then I hate to think what he's saying in private.

His message: "The interested scientist should beware." That I think has been Peter's message for some years now: to scare chemists, physicists, and electrical engineers away from repeating the experiments of Mills and BLP, and to scare journal editors away from publishing their results.

Since so many hard words by Zimmerman about Mills and BLP have passed onto the list (which is OK by me, since those words convict Zimmerman out of his own mouth), I'll venture my own blunt opinion of what he has been doing: Where Mills and BLP and their work have been concerned, Peter Zimmerman has been a [slanderous four-letter word deleted --LS], and I hope that interested parties will take that into account.

Tom Stolper BA math, MA polisci

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Hydrino Study Group (HSG):

A serious look at the novel theory of Dr. Randell Mills.

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From:

"Peter Zimmerman" <peterz@erols.com>

To:

<hydrino@yahoogroups.com>

Sent:

Wednesday, October 29, 2003 1:24 PM

Subject:

Re: HSG: Re: Zimmerman's APS Centennial Meeting Talk

By yumpin' yimminy,

Mr. S has a better memory than I. I accidentally conflated Tom Vallone's nastiness with Shelby Brewer's and Randell Mills's thugs.

To set the record straight, I did discuss RLMMD at modest length in Atlanta, along with PAGD (sorry Malagosia), n-rays, zeropoint energy, the "US antigravity squadron", CF/LENR/CANR and a bunch of other silly ideas, probably including Joe Newman. And I also explained to what lengths the State Department had to go to ensure that the infamous Conference on Free Energy was not held in its building under the sponsorship & with the implied endorsement of Secretary Albright. I agree that I had not heard from the BLP goon squad at that point.

By the way, once I got the CoFE out of my building I didn't give a damn where it was held or who sponsored it, and Vallone to the contrary, never once tried to get them ousted from Commerce or him ousted from his job.

The goons got to me shortly after the abstract for the Long Beach meeting was published, the one where APS left off the disclaimer (Stolper is right, as I said). Before the abstract came out, I think, a private eye, whose name I've certainly forgotten, tried to bully me on the phone into admitting that I had influenced the withdrawal of the infamous almost-issued patent. Since I hadn't, I wouldn't.

Then Brewer wrote Sec. Albright. And finally BLP's legal hit squad called me and threatened suit for "tortious interference with business" or some such.

We did pull the abstract; it was possible to pull it but not to add back in the disclaimer.

But, the paper was not pulled and went forward almost as planned except for leaving out criticism of BLP but also including a warning that "some companies" were willing to go quite far in general thuggery and mopery. And that the interested scientist should beware.

Anyway, I gave all of the files I had to my attorney, a former Director of Central Intelligence, and I let him take care of all further correspondence with the BLP attorneys. Gotta say, there wasn't much once I gave them the name of my counsel.

Why the confusion? Well I give a bunch of talks a year, and for the last decade plus have either organized an invited symposium or spoken at

10/29/2003

one at the APS almost every year -- sometimes both in the same year. I organized the Atlanta one, and had to pinch hit at the last minute for a speaker who couldn't make it, if I remember correctly. They all run together, I'm afraid.

This ends this silly and unproductive thread. If Mr. Stolper wants to discuss technical issues instead of ancient history, perceived slights, and personalities, I'm here waiting.

--pz

Tstolper@aol.com wrote:

```
>In message 7422 dated October 28, 2003, confronted with evidence from a
>transcript, Peter Zimmerman suddenly changed his story:
>"I probably did mention BLP and did explain the notion of hydrini. It's even
>possible
>that I joked about it. So what?"
>Zimmerman made fun of the work of Mills and BLP before a large and
>influential audience in Atlanta, that's what, and in a panel devoted to making fun of
>cranks and junk science. In his message 7422 Zimmerman even wished that he had
>gone further than he did. In the HSG and elsewhere, I think he has.
>Zimmerman then acts as if he were the aggrieved party. The man has a lot of
>brass.
>The panel event at the APS Centennial meeting in Atlanta occurred in March
>1999. The talk by Zimmerman that he cancelled in 2000 was to be given at the
>APS meeting in Long Beach, California, in April 2000. That's more than a year
>after the Centennial meeting in Atlanta. The withdrawal from issue of the
>BLP chemical patent applications occurred in February 2000, a couple of months
>before the Long Beach meeting, and almost a year after the Centennial meeting.
>What was the date of the letter by Shelby Brewer that Zimmerman claims to
>know about?
>And who were the alleged private eyes?
>Tom Stolper
>BA math, MA polisci
>
>[Non-text portions of this message have been removed]
>
>
>Hydrino Study Group (HSG):
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>A serious look at the novel theory of Dr. Randell Mills.

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Jeffrey S. Melcher

From:

<Tstolper@aol.com>

To:

<hydrino@yahoogroups.com>

Sent:

Tuesday, October 28, 2003 8:31 PM

Subject:

HSG: Re: Zimmerman's APS Centennial Meeting Talk

In message 7422 dated October 28, 2003, confronted with evidence from a

transcript, Peter Zimmerman suddenly changed his story:

"I probably did mention BLP and did explain the notion of hydrini. It's even possible

that I joked about it. So what?"

Zimmerman made fun of the work of Mills and BLP before a large and influential audience in Atlanta, that's what, and in a panel devoted to making fun of cranks and junk science. In his message 7422 Zimmerman even wished that he had gone further than he did. In the HSG and elsewhere, I think he has.

Zimmerman then acts as if he were the aggrieved party. The man has a lot of brass.

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What was the date of the letter by Shelby Brewer that Zimmerman claims to know about?

And who were the alleged private eyes?

Tom Stolper BA math, MA polisci

[Non-text portions of this message have been removed]

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From:

"smenton" <smenton@reuphlaw.com>

To:

<hydrino@yahoogroups.com>

Sent:

Sunday, October 26, 2003 8:18 PM

Subject:

HSG: Even skeptics can lose objectivity

Peter Zimmerman wrote in response to Tom Stolper's questions about pz's

presentation at an annual meeting of the APS:

> pz was a member of a panel. Including James Randi and Bob Park.

> because the BLP legal goon squad had already hit me with

>their poisoned clubs, I carefully avoided mentioning BLP and hydrini.

> A clear case of

> intimidation working.

Was this was the meeting back in April of 2001 that followed shortly after the USPTO decision to withdraw from issuance the BLP patents after some highly unusual and suspect contact from people outside the patent office who had not even reviewed the patent office file? See HSG Message #s 764, 765, 775 and 1452. I saved a copy of the abstract of the planned presentation that was scheduled for April 30 at the Long Beach Convention Center. The

abstract appeared under the name of "Peter D. Zimmerman (United States Department of State, Washington DC 20520)" and provided as follows:

"Pseudoscience, and particularly `psuedophysics' is alive and thriving as we approach the turn of the millennium. Not only have many 'inventors' of cold fusion spin-offs been making money from investors, but they and 'inventors' of various kinds of 'zero point energy' devices, perpetual motion machines, and other such wonders such as 'hydrinos' have found friends in the United States Senate. At least one Nobel Laureate in physics has come to their aid. The Web has been a powerful organizing force as well.

Some organizations, including my own Department and the Patent Office have fought back with success, but always at great cost in time and energy. Psuedophysicists and their friends have money, influence, and sometimes clout. They have not hesitated to use threats, personal attacks, and the full machinery by which government is made accountable to the public to strike at those who expose fraud. Encounters with psuedophysicists are like grabbing a hot wire; after the first contact it is hard to get free, and it can inflict serious injury. But you, and I, and all our colleagues in the APS must do what we can to ensure that U.S. policy is not manipulated by pseudoscience, to make certain that taxpayer money is not wasted on nonsense, and to restore public confidence in real science. This will take efforts at public education, work, and as I have learned in the last year not a little bit of courage. APS and FPS should be in the thick of the battle. This talk is an account of a year in the fray."

It was shortly after this scheduled talk that PZ made his first posts on HSG. It is small wonder that many of us have been concerned about the motives of the skeptics on this group. Are they really interested in furthering scientific understanding of the unique phenomena being observed on a daily basis in the BLP labs and in other labs around the world or are they more focused on vindicating their own preconceived concepts of Mills and his work and justifying the vicious public denouncements made by people who have never reviewed the BLP experimental work let alone tried to replicate it.

I went back to take a look at what has transpired since Luke had the foresight to start this group roughly three and a half years ago. (BTW Luke, sorry you had to intervene and start moderating again, but it is a greatly appreciated service.) The following is a quick list that I was able to put together of the publications by Mills and others during that time frame.

R. L. Mills, P. Ray, B. Dhandapani, J. He, Extreme Ultraviolet Spectroscopy of Helium-Hydrogen Plasma,

- J. Phys. D, Applied Physics, Vol. 36, (2003), pp. 1535-1542;
- R. L. Mills, P. Ray, B. Dhandapani, R. M. Mayo, J. He, Comparison of Excessive Balmer Line Broadening of Glow Discharge and Microwave Hydrogen Plasmas with Certain Catalysts,
- J. of Applied Physics, Vol. 92, No. 12, (2002), pp. 7008-7022.
- H. Conrads, R. Mills, Th. Wrubel, Emission in the Deep Vacuum Ultraviolet from a Plasma Formed by Incandescently Heating Hydrogen Gas with Trace Amounts of Potassium Carbonate, Plasma Sources Science and Technology, Vol. 12, (2003), pp. 389-395
- R. L. Mills, P. Ray, B. Dhandapani, M. Nansteel, X. Chen, J. He, New Power Source from Fractional Quantum Energy Levels of Atomic Hydrogen that Surpasses Internal Combustion, J Mol. Struct., Vol. 643, No. 1-3, (2002), pp. 43-54.
- R. L. Mills, P. Ray,

Stationary Inverted Lyman Population Formed from Incandescently Heated Hydrogen Gas with Certain Catalysts,* J. Phys. D, Applied Physics, Vol. 36, (2003), pp. 1504-1509;

R. M. Mayo, R. Mills, M. Nansteel,

On the Potential of Direct and MHD Conversion of Power from a Novel Plasma Source to Electricity for Microdistributed Power Applications,

IEEE Transactions on Plasma Science, August, (2002), Vol. 30, No. 4, pp. 1568-1578

R. Mills, E. Dayalan, P. Ray, B. Dhandapani, J. He,

Highly Stable Novel Inorganic Hydrides from Aqueous Electrolysis and Plasma Electrolysis

Electrochimica Acta, Vol. 47, No. 24, (2002), pp. 3909-3926.

R. Mills, M. Nansteel, and P. Ray,

Excessively Bright Hydrogen-Strontium Plasma Light Source Due to Energy Resonance of Strontium with Hydrogen,

J. of Plasma Physics, Vol. 69, (2003), pp. 131-158.

R. L. Mills, J. Sankar, A. Voigt, J. He, B. Dhandapani, Spectroscopic Characterization of the Atomic Hydrogen Energies and Densities and Carbon Species During Helium-Hydrogen-Methane Plasma CVD Synthesis of Diamond Films, Chemistry of Materials, Vol. 15, (2003), pp. 1313-1321

R. Mills and M. Nansteel, P. Ray, Argon-Hydrogen-Strontium Discharge Light Source, IEEE Transactions on Plasma Science, Vol. 30, No. 2, (2002), pp. 639-653.

R. Mills,

Highly Stable Novel Inorganic Hydrides, Journal of New Materials for Electrochemical Systems, Vol. 6, (2003), pp. 45-54

R. L. Mills, P. Ray,

Spectroscopic Characterization of Stationary Inverted Lyman Populations and Free-Free and Bound-Free Emission of Lower-Energy State Hydride Ion Formed by a Catalytic Reaction of Atomic Hydrogen and Certain Group I Catalysts, Journal of Quantitative Spectroscopy and Radiative Transfer, No. 39, sciencedirect.com, April 17, (2003).

R. Mills, P. Ray, R. M. Mayo, *CW HI Laser Based on a Stationary Inverted Lyman Population Formed from Incandescently Heated Hydrogen Gas with Certain Group I Catalysts,

IEEE Transactions on Plasma Science, Vol. 31, No. 2, (2003), pp. 236-247

R. L. Mills, P. Ray, J. Dong, M. Nansteel, B. Dhandapani, J. He, *Spectral Emission of Fractional-Principal-Quantum-Energy-Level Atomic and Molecular Hydrogen, Vibrational Spectroscopy, Vol. 31, No. 2, (2003), pp. 195-213

R. L. Mills, P. Ray, E. Dayalan, B. Dhandapani, J. He, Comparison of Excessive Balmer a Line Broadening of Inductively and Capacitively Coupled RF, Microwave, and Glow Discharge Hydrogen Plasmas with Certain Catalysts, IEEE Transactions on Plasma Science, Vol. 31, No. 3, June, (2003) 338-355.

R. M. Mayo, R. Mills, M. Nansteel, Direct Plasmadynamic Conversion of Plasma Thermal Power to Electricity, IEEE Transactions on Plasma Science, October, (2002), Vol. 30, No. 5, pp. 2066-2073.

R. Mills, P. Ray, R. M. Mayo, The Potential for a Hydrogen Water-Plasma Laser, Applied Physics Letters, Vol. 82, No. 11, (2003), pp. 1679-1681.

R. Mills,

Novel Hydrogen Compounds from a Potassium Carbonate Electrolytic Cell, Fusion Technology, Vol. 37, No. 2, March, (2000), pp. 157-182.

R. L. Mills, P. Ray, *Substantial Changes in the Characteristics of a Microwave Plasma Due to Combining Argon and Hydrogen,

New Journal of Physics, www.njp.org, Vol. 4, (2002), pp. 22.1-22.17

R. Mills and M. Nansteel, P. Ray,

Bright Hydrogen-Light Source due to a Resonant Energy Transfer with Strontium and Argon Ions,

New Journal of Physics, Vol. 4, (2002), pp. 70.1-70.28

Keep in mind that in many instances it took several years for some of the journals to decide to go forward with publishing Mills' work. For example, there was close to a 4 year time lag between the time Dr. Conrads appeared with Mills at the ACS meeting in 1999 and the publication this year of the first paper regarding their joint efforts in Plasma Sources Science and Tech.

>From the endnotes in the some of these papers, it appears that there are 6 or more papers "in press." It also appears that there are more than two dozen additional papers that have been submitted to various journals. I have deliberately not included the Int. J of H Energy, which I understand has a peer review process before publication and has published 20 or more articles by Mills. I don't want to rehash the merits of the various journals, but I wonder if all the skeptics combined can equal this publication list during the same time period. The point is that, despite the preconceived notions of many of the skeptics on HSG, Mills has been doing real science for quite some time.

Tom S has on several occasions referred to what he calls a FUD campaign. I hope that there is nothing that overt, but I am concerned that this forum is being used to stifle rather than encourage the scientific process. Recently, Tom questioned the participation of the mysterious Uncle E who has suddenly appeared with some exotic explanations for the results of one of Mills' experiments published in a major journal. Uncle E went so far as to suggest that the referees had failed to do their job. How does he know what exchanges took place during the peer review process? Maybe the authors of the paper and those who were responsible for reviewing it considered Uncle E's explanation as so off the wall as to be unworthy of mention given the experimental conditions. Personally, I really don't care if Uncle E wants to maintain anonymity, but I do wonder what prompted him to suddenly appear on HSG and what he is hoping to accomplish here. Is he truly interested in furthering the understanding of the experimental results or is he here to support those have an admitted agenda to "drive a stake in the heart of CQM?"

Too many self-annointed judges of what constitutes "real science" feel authorized to interfere with the actual practice of science. Judging from the off-line emails I got after my post # 7191 raising questions as to the nature and extent of pz's communications to editors of the various journals that have published Mills' work, I know there are a number of HSG members and lurkers who are concerned as to whether there has been any outside interference in the determination of whether Mills work should be published. PZ has decided not to respond to the Q's that I posed and that is certainly his prerogative. But in view of the abstract above, does anybody think that pz has been encouraging publication of Mills' work in order to further scientific understanding? The truth will ultimately be found in the experimental results and Mills is certainly not attempting to avoid scrutiny of his work. With the return of HSG to a moderated format (and the hopeful elimination of ebay commercials and online

emasculation,) I hope HSG can proceed with a goal of furthering rather than inhibiting the scientific process.

Steve Menton

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Jeffrey S. Melcher

From:

"Peter Zimmerman" <peterz@erols.com>

To:

<hydrino@yahoogroups.com>

Sent:

Thursday, September 25, 2003 4:51 PM

Subject:

Re: HSG: Zimmerman's Insincere Questions

No. Steve, I haven't met the man nor been to the lab.

But I've read his papers, been threatened by his legal squad, and read his old commentaries to this list and his off-list comments to me. In addition I've corresponded with some of his old professors and investors who know him well. And, yes, I've had significant conversations, mostly by e-mail, with the editors of the better-grade journals in which his articles have appeared.

I have merely expressed a personal opinion about the personality of RLMMD. And a professional opinion as to the correctness of his work. I'm entitled to do both.

--pz

smenton wrote:

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>Peter Zimmerman wrote:
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> > >

>>...I don't think

>>Mills is right, and I don't think he's either a nice person or a

>>

>good

>

>>scientific colleague...

>>

>>

>So we can fully understand upon which these conclusions are based, >have you ever met Mills? talked to him in person without lawyers >present? Been to his lab? seen any of his experiments first hand? >talked directly with any of the BLP employees who have been running

>the experiments for Mills? Talked directly with any of the outside

>consultants or other scientists who have actually attempted to >replicate the reported experimental results? Talked with any of the

>editors or peer reviewers for any of the numerous journals that have

>published his work? Just curious.

>Steve Menton

>

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Jeffrey S. Melcher

From:

"Peter Zimmerman" <peterz@erols.com>

To:

<hydrino@yahoogroups.com>

Sent:

Monday, February 23, 2004 5:13 PM

Subject:

HSG: Re: Book Review by Dr. John Farrell

You know, having John Farrell write a review of GUTCOM, I mean GUTCQM.

is about as objective as having me write one -- but from the other direction. Remember that Farrell is an investor in BLP (so the review is hardly disinterested), and Mills was Farrell's student and still a

close friend.

Come on, guys.

-pz

John A. Kassebaum wrote:

<< BOOK REVIEW of the Grand Unified Theory of Classical Quantum Mechanics</p> -- Dr. John Farrell

http://blacklightpower.com/pdf/GUT/Review%20by%20John%20J.%20Farrell%20021004.pdf >>

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Msg #

From: @ "Peter Zimmerman" < peterz@e...>

Date: Thu May 22, 2003 1:04 am

Subject: Re: Re: Zero Electrostatic Self-Interaction Justified

Pls see usual +++ marks
---- Original Message ----

From: <u>Tstolper@a...</u>

To: hydrino@yahoogroups.com

Sent: Wednesday, May 21, 2003 8:45 PM Subject: HSG: Re: Zero Electrostatic Self-

Interaction Justified

In reply to John Kassebaum's message 6030 dated May 20, 2003:

Postulating no electrostatic selfinteraction of the electron orbitsphere (OSNIP) would be one way to go. Personally, I would justify zero electrostatic self-interaction by following Churl Oh's reasoning and noting that in the

electron, there are no electric field lines between two points of the OS itself.

+++ Field lines aren't anything but a visualization tool, useful only in a limited number of cases. What counts is the field itself. And there is no question that the surface of a non-conducting sphere of charge repels itself.

One could continue to use Coulomb's law between the proton and the bound electron, or between the proton and elements of the bound electron, since field

lines of the proton connect the proton with the bound electron.

I believe that Faraday would approve of this way of looking at things.

But he wouldn't approve of nonconservation of energy, and if zero electrostatic self-interaction of the electron orbitsphere leads to nonconservation of energy, then OSNIP is wrong.

+++Conservation of energy as a formal concept is quite modern. Is there anybody around here science historian enough to tell us if the idea was accepted when Faraday was alive and working? I have a suspicion that it was not. In any event, brilliant tho' Sir Michael was, we can hardly use an early 19th century physicist as the authority figure by which to judge 21st century physics thinking.
++pz

(On a different matter, in message 6045 dated May 21, 2003, Luke Setzer

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informed the list that the poster millennium has been banned from the HSG in order

to keep it on-topic. In message 6046, Peter Zimmerman said thanks. I heartily agree, and Luke's swift action has rendered unnecessary an email requesting it. Thank you, Luke.)

++and thanks to you to, Tom, on this one. Did anybody look at the fellow's website? Ugh!

Tom Stolper BA math, MA polisci

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FARKAS & MANELLI PLLC ATTORNEYS

January 19, 2001

VIA COURIER

Ms. Esther Kepplinger Director of Group 1700 United States Patent & Trademark Office Washington, D.C. 20231

Re: U.S. Patent Application Serial Nos.: 09/009,837; 09/008,947; 09/009,294;

09/009,455; 09/110,678; 09/111,160; 09/111,003; 09/501,622;

09/110,694; 09/110,717; 09/225,687; and 09/362,693

Inventor: Dr. Randell L. Mills

Examiners: S. Kalafut and H. Langel

Dear Ms. Kepplinger:

This letter is to advise you that Dr. Mills has arranged for a personal interview with Examiners Kalafut and Langel for February 21, 2001, 10:00 AM, to discuss outstanding Office Actions in all of the above-identified patent applications. Since all of the applications contain similar rejections under 35 U.S.C. §§ 101 and 112 based on issues relating to quantum mechanics, in particular the Schrodinger Equation, the Examiners and Dr. Mills have agreed that it would be prudent to conduct the interview simultaneously in all applications. To assist Dr. Mills in adequately preparing for this interview, we request that the Patent Office provide certain information as detailed below, which frankly should have been disclosed to Dr. Mills long ago. We also request the presence of certain Patent Office personnel, including yourself, at the February 21st interview to facilitate a prompt resolution of all outstanding issues.

As you are no doubt aware, the Patent Office's position as to the patentability of Dr. Mills' technology has changed radically over the last year. Initially, during our February 28, 2000 discussion, you stated that our '294 application was being withdrawn from allowance because Dr. Mills' technology was based on "cold fusion" and "perpetual motion." Only after Dr. Mills took this matter to a federal district court did the Patent Office abruptly alter its position. According to the March 22, 2000 Decision on Petition filed in that case, the '294 application was withdrawn because Dr. Mills' technology supposedly violated "the laws of chemistry and physics," even though no specific law of chemistry or physics was identified.

Ms. Esther Kepplinger January 19, 2001 Page 2 of 6

In the most recent Office Actions entered in the above-identified applications, the Patent Office once again has changed its position. The Patent Office now argues that Dr. Mills' technology cannot exist because it is not in compliance with the Schrodinger Equation, which is neither a law of physics or chemistry. In support of its new position, the Patent Office argues that "[n]ot every mathematically possible solution to the Schrodinger Equation leads to a physically meaningful description." That argument, however, only begs the question: How can one know which solutions of the Schrodinger Equation represent physical reality other than by actual measurements of hydrogen atoms?

Dr. Mills has now found additional solutions to the Schrodinger Equation that represent physical reality, namely, fractional quantum number states, which are supported by actual measurements of newly-created compounds containing hydrogen atoms at these lower-energy states. Examiners Kalafut and Langel extensively studied this experimental data during six personal interviews and, based on this evidence, allowed five of the above-identified applications (now withdrawn) and issued U.S. Patent No. 6,024,935 ('935 patent). Dr. Mills intends to resubmit this substantial experimental evidence in the February 21st interview, as well as recent experimental evidence, to again establish the existence of these lower energy states to the satisfaction of the Patent Office, and thereby demonstrate the utility and enablement of his invention.

Based on the prior representations of Examiners Kalafut and Langel - - who exhaustively examined the applications and, believing that the claimed technology fully complies with Sections 101 and 112, allowed six of them - - it was readily apparent that neither Examiner of record drafted the newly-minted Section 101 and 112 rejections now pending in the above-identified applications. Recent conversations with Examiners Kalafut and Langel confirmed that belief as I became aware that the Section 101 and 112 rejections were drafted by a "secret committee" of Examiners, Supervisors and Directors established to conduct a "behind the scenes" prosecution of the above-identified applications. I further learned that this secret committee instructed Examiners Kalafut and Langel to issue the Office Actions containing the Section 101 and 112 rejections. While the Office Actions fail to identify the make-up of the committee, I am aware of at least the following committee members:

FAULAS & MAANELL

¹Dr. Mills' PCT/US99/17129, International Preliminary Examination Report, Response to Applicant's Arguments Concerning the Written Opinion.

Ms. Esther Kepplinger January 19, 2001 Page 3 of 6

Examiner Vasudevan Salem Jagannathan Examiner Suzi N. Tsang Examiner Jerome Massie Examiner Steven P. Griffin Director Jacqueline M. Stone

Examiners Langel and Kalafut further informed me that they believe Examiner Jagannathan, a physicist, was the committee member who provided the most input on the Section 101 and 112 rejections. Upon learning this, I telephoned Examiner Jagannathan on January 16, 2001 to discuss his availability to attend the February 21st interview and to inquire as to the type of experimental evidence that would be required to satisfy him that Dr. Mills' technology is fully operable. I must say, I was stunned by Examiner Jagannathan's reaction to my call. He immediately raised his voice and in a very stern manner steadfastly refused to answer any questions or provide me with any information since, in his words, he is not the Examiner of record. Examiner Jagannathan further stated that only Examiners Langel or Kalafut could request his presence at the interview, without providing any assurance that he would comply with such a request.

It is bad enough that Examiner Jagannathan offered no explanation as to why he was not identified as an Examiner of record in this case based on the input he provided on the pending Office Actions. It only makes matters worse that he would use his non-record status as an excuse to withhold information that is vital to Dr. Mills prosecuting his applications.

Clearly, an interview with just Examiners Langel and Kalafut in attendance would be non-productive, since they both already believe that the applications fully comply with Sections 112 and 101 and, therefore, should be allowed. In essence, the Patent Office is requesting that we conduct a sham interview with what the Patent Office perceives to be "puppet" Examiners who did not even write, and disagree with, the rejections and without knowing the type of experimental evidence that would satisfy the concerns of the secret Examiners who are "pulling the strings." Dr. Mills has already submitted evidence relating to energy balances, heat and light data from working processes, and spectral data from compounds containing the lower-energy hydrogen atoms, including nuclear magnetic resonance spectroscopy, time-of-flight-secondary-ion-mass-spectroscopy, and X-ray photoelectron spectroscopy. It was precisely this evidence that convinced the Examiners of record to allow six of Dr. Mills' applications. Unfortunately, it appears that the Patent Office is not really interested in a fair and open discussion of the evidence, but rather, is seeking to "deep-six" Dr. Mills' technology along with the patent rights to which he is entitled.

Ms. Esther Kepplinger January 19, 2001 Page 4 of 6

The formation of a secret committee allied against Dr. Mills is just another example of the extreme lengths to which the Patent Office has gone to subvert issuance of Dr. Mills' patent applications. This latest action is consistent with the extreme positions the Patent Office has taken in litigation over the previously allowed applications that were withdrawn without the slightest review under mysterious circumstances. Indeed, Kevin Baer, the Patent Office's counsel, went so far as to argue to a federal judge that Examiners Kalafut and Langel allowed the six applications because they were "swamped" and "if they're going to approve it, they just approve it and kind of let it out the door." Attachment A. This argument not only repudiates the presumption of validity that attaches to issued patents, but further overlooks the fact that six lengthy personal interviews with Examiners Langel and Kalafut were conducted, during which extensive experimental results were discussed.

Strangely, Mr. Baer also argued that Dr. Mills is not qualified to invent the subject technology because he is a medical doctor, overlooking the fact that he is an accomplished chemist, and further that "[i]f someone actually invents this, assuming Dr. Mills has not invented this, if someone comes along and invents it in the future, they could be blocked by a valid patent [referring to Dr. Mills issued '935 patent]." Attachment B. This argument confirms Dr. Mills' strong suspicion that the Patent Office has been colluding with competitors of Dr. Mills', including Dr. Robert Park of the American Physical Society, who may be trying to appropriate Dr. Mills' technology. Dr. Mills has learned - - and the Patent Office has been made aware - - that there is a "deep throat" contact in the Patent Office with whom Dr. Park has had communications regarding Dr. Mills' pending patent applications. This fact, which was first brought to the attention of the Patent Office over four months ago during the litigation and to this day has not been denied. Attachment C.

In view of the above circumstances and in the interest of fairness, Dr. Mills requests a full written disclosure of all U.S. Patent Office personnel who took part in preparing the Section 101 and 112 rejections, as well as all U.S. Patent Office personnel who provided any input regarding the Office Actions in the above-identified applications. We request that all such persons be present at the February 21st interview. We also request that all members of the secret committee be identified and be present at the interview so that we can address any and all concerns of those who will actually decide the fate of the pending applications.

Dr. Mills has been made aware that the above-identified applications may have been reviewed by an unnamed "consultant" from the National Institutes of Science and Technology (NIST). Dr. Mills also requests full and fair written disclosure of all non-Patent Office personnel, including personnel from NIST, who were provided access to any of the above-identified applications and/or provided input on the Office Actions.

Ms. Esther Kepplinger January 19, 2001 Page 5 of 6

We ask that you also be present at the interview, as we would like to revisit the question of who was responsible for bringing Dr. Mills' '935 patent to the Patent Office's attention, thereby setting in motion the events that led to the withdrawal of Dr. Mills' allowed applications. You and the Patent Office have now taken three conflicting positions on this issue: (1) you stated to me on February 28, 2000 that you pulled the applications from issuance based on perceived heat - - a "fire storm" as you put it - - the Patent Office had received from an undisclosed, outside source in response to the issuance of the '935 patent, and that it was Gregory Aharonian who brought the '935 patent to the attention of the Patent Commissioner; (2) you stated in a signed affidavit filed with the D.C. District Court that your decision to withdraw the applications was not based on any "perceived heat the USPTO has received from an undisclosed, outside source," Attachment D; and (3) subsequently, the Patent Office's counsel argued during the May 22, 2000 hearing that he did not know how you became aware of the '935 patent, suggesting that a blimp could have flown over the Patent Office advising you of the '935 patent, for all it mattered, and then abruptly changed his position a short while later in a brief to the D.C. District Court stating that the press initiated the withdrawal of the applications, Attachment E. We would like to hear from you first hand, on the record, as to which individual(s) contacted you or other Patent Office personnel and instructed, or otherwise precipitated in, the withdrawal of the applications from issuance.

We believe that we are entitled to this information and that previous attempts to keep it secret - - even in response to two previous Senate inquiries - - are without basis. This information is not attorney-client privileged, nor the subject of any issue to be resolved in the pending litigation. Indeed, both the Patent Office and Dr. Mills have stipulated that information as to how the Patent Office became aware of the issued '935 patent that caused you to withdraw Dr. Mills' allowed applications from issuance is immaterial to the lawsuit. Furthermore, the Patent Office's argument that prosecution of the withdrawn applications should be separate and distinct from the lawsuit as a procedural matter, and its reopening of prosecution in these applications brings to the forefront questions regarding who instigated the taking of such actions, the real parties prosecuting the applications on behalf of the Patent Office, and the extent of any outside influences on the prosecution of these applications. This information has a direct bearing on the fair and open prosecution of these applications and, therefore, it must be disclosed.

EARKAS & MAABELLI

Ms. Esther Kepplinger January 19, 2001 Page 6 of 6

Dr. Randell L. Mills

Please also be advised, that due to the unusual actions the Patent Office has taken with respect to Dr. Mills' applications, as well as the significant impact of Dr. Mills' technology on U.S. energy policy, we intend to have one or more U.S. Senators and/or Government Officials be made of record in the applications and attend the interview to monitor the situation.

I look forward to your prompt written response to this letter.

Sincerely yours,

Jeffrey S. Melcher Reg. No. 35,950 Customer No. 20736

CC: The Honorable Senator Max Cleland
The Honorable Senator Arlen Specter
Transition Office - Energy Department
Transition Office - Commerce Department
The Honorable Secretary Designate of Commerce - Don Evans
Examiner Vasudevan Salem Jagannathan
Director Jacqueline M. Stone
Examiner Suzi N. Tsang
Examiner Jerome Massie
Examiner Steven P. Griffin
Examiner Wayne A. Langel
Examiner Steven J. Kalafut

FARMAS & MAANELLI

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BLACKLIGHT POWER,	INC.)	C.A. NO. 00-422 (EGS)
)	
VS.)	WASHINGTON, D.C.	
)	MAY 22, 2000
Q. TODD DICKINSON)	10:00 A.M.

TRANSCRIPT OF MOTIONS HEARING BEFORE THE HONORABLE EMMET G. SULLIVAN UNITED STATES DISTRICT JUDGE

APPEARANCES:

FOR THE PLAINTIFF: MICHAEL H. SELTER, ESQ.

JEFFREY A. SIMENAUER, ESO.

JEFFREY S. MELCHER, ESQ.

FOR THE DEFENDANT: FRED E. HAYNES, ESQ.

KEVIN BAER, ESQ.

COURT REPORTER: FRANK J. RANGUS, OCR

U. S. COURTHOUSE, RM. 6822

WASHINGTON, D.C. 20001

(202) 371-0545

PROCEEDINGS RECORDED BY ELECTRONIC STENOGRAPHY; TRANSCRIPT PRODUCED BY COMPUTER.

FORM AND A PATENT COULD ISSUE WITHOUT ANY MEANINGFUL REVIEW? 1 2 MR. BAER: WELL, NO, YOUR HONOR, THERE IS REVIEW. THE PATENT EXAMINERS DO REVIEW THEM. UNFORTUNATELY, PATENT 3 EXAMINERS ARE SWAMPED AND SOMETIMES THINGS SLIP THROUGH. IN 4 ---THIS CASE, AT LEAST THE APPLICATION AT ISSUE IN THIS SUIT, IT 5 DOESN'T APPEAR THAT THE EXAMINER DISCUSSED THE FRACTIONAL 6 QUANTUM NUMBERS. NOW, PLAINTIFF WILL ARGUE THAT THEY DID, BUT 7 I CAN'T FIND ANYTHING IN THE RECORD WHERE THEY DISCUSSED A 8 9 FRACTIONAL END NUMBER. THAT'S THE QUANTUM NUMBER. UNFORTUNATELY, THE ONE THAT ISSUED GOT THROUGH. BUT HERE WE 10 HAVE BEEN ABLE TO TAKE A SECOND LOOK AT IT AND WE HAVE SERIOUS 11 QUESTIONS ABOUT THE PATENTABILITY, AND WE DON'T WANT TO ISSUE 12 13 AN INVALID PATENT. 14 THE COURT: IF THE COURT AGREES WITH THE GOVERNMENT 15 THAT THE PATENT SHOULD NOT ISSUE, THERE ARE ADMINISTRATIVE 16 REMEDIES AVAILABLE TO THE PLAINTIFF? 17 MR. BAER: OH, ABSOLUTELY, YOUR HONOR. 18 THE COURT: THIS IS NOT A REJECTION. THIS IS MERELY 19 WHAT? 20 MR. BAER: IT'S A PROCEDURAL TOOL TO ALLOW EXAMINATION 21 TO CONTINUE. WHAT COULD HAPPEN, PLAINTIFF KEEPS TELLING US THAT THEY'LL COME IN THE OFFICE AND THEY'LL PROVE IT'S 22 23 PATENTABLE, AND IF IT IS PATENTABLE, WE WILL ISSUE IT. 24 THE COURT: SO IT'S NOT AS IF THE PLAINTIFF IS OUT OF 25 COURT?

THE COURT: THEY'RE SO NOVEL THAT THEY REQUIRE INVESTMENTS OF TIME, SIGNIFICANT INVESTMENTS OF TIME, TO DETERMINE WHETHER OR NOT THEY ARE PATENTABLE, I ASSUME.

MR. BAER: THAT IS CORRECT, YOUR HONOR.

THE COURT: WHAT HAPPENED IN THIS CASE? THIS PATENT
WAS FILED A COUPLE OF YEARS AGO. IT LOOKS LIKE EVERYONE FELL
ASLEEP AT THE SWITCH UNTIL AFTER ONE PATENT WAS ISSUED AND THAT
TRIGGERED THIS. AFTER THE 935 PATENT WAS ISSUED, THEN THAT
TRIGGERED ALL SORTS OF SCRUTINY FOR THE 294.

MR. BAER: YOUR HONOR, IT IS FILED. THE EXAMINER

LOOKS AT IT. I BELIEVE THE EXAMINER ONLY HAS, IT IS LESS THAN

A WEEK, AND I BELIEVE THEY HAVE TO LOOK AT TWO OR THREE

APPLICATIONS A WEEK. SO VERY LITTLE TIME ACTUALLY WAS SPENT

LOOKING AT THIS APPLICATION. SO THE EXAMINER ISSUED SOME

OFFICE ACTIONS. IT WENT BACK AND FORTH AND EVENTUALLY HE

ALLOWED IT, BUT THERE WAS NOT A TWO-YEAR INVESTIGATION OF THIS.

YOU HAD ALSO ASKED, HAD THE OFFICE RUN ANY TESTS? WE DON'T HAVE ANY ABILITY WITHIN THE AGENCY TO RUN THE TESTS.

THAT'S WHY WE WANT THE APPLICANT TO COME IN. AND ONCE AGAIN I HAVE TO REMIND YOU THEY REQUESTED TO COME IN IN THEIR FORMAL LETTER TO THE AGENCY: "LET US COME IN AND TALK TO YOU ABOUT THIS BEFORE YOU DO ANYTHING." WE AGREED TO THAT. THEY'VE NOW BACKED AWAY FROM THAT.

THE COURT: WHAT'S THE PREJUDICE TO THE GOVERNMENT IF
THIS PATENT ISSUES? I MEAN, THE PLAINTIFFS MAINTAIN IT WILL DO

ATTENTION TO THAT. THE PATENT NEVER ISSUED. NOW, NOT ALL OF 1 THOSE ARE FOR THIS REASON. SOME WOULD BE FOR INTERFERENCES. 2 SOME WOULD BE AT THE APPLICANT'S REQUEST. BUT IT'S NOT AN 3 UNCOMMON OCCURRENCE THAT THE AGENCY, AFTER THE ISSUANCE FEE IS 4 5 PAID, FINDS SOME REASON TO WITHDRAW THE PATENT. 6 THERE'S ALSO USUALLY A TIME LAG BETWEEN WHEN THE 7 NOTICE OF ALLOWANCE GOES OUT AND THE ISSUE FEE IS PAID, AND IN THESE CASES THE ISSUE FEE IS PAID WITHIN DAYS. NOW, THAT'S NOT 8 TO SAY IT NEVER HAPPENS, AND MAYBE THAT'S THIS FIRM'S PRACTICE, 9 10 TO DO IT ALL THE TIME. IN MOST OF THE CASES I'VE SEEN, THERE'S 11 ALWAYS A LONG DELAY. 12 THE COURT: WAS THAT A SIGNIFICANT SUM OF MONEY? 13 MR. BAER: I BELIEVE IT'S AROUND A THOUSAND DOLLARS. 14 THE COURT: A THOUSAND DOLLARS. ALL RIGHT. 15 MR. BAER: IT'S NOT THAT SIGNIFICANT FOR A 16 CORPORATION. 17 THE COURT: IS IT SIGNIFICANT THAT, WHEN THE 18 APPLICATION FOR THE PATENT WAS APPROVED, THERE WERE NO REASONS 19 GIVEN? IS THAT USUAL OR NOT? 20 MR. BAER: THAT OFTEN HAPPENS ALSO, YOUR HONOR. THE 21 EXAMINERS ARE UNDER TREMENDOUS PRESSURE TO PRODUCE WORK, AND II 22 THEY'RE GOING TO APPROVE IT, THEY JUST APPROVE IT AND KIND OF 23 LET IT OUT THE DOOR. SOMETIMES, THEY DO PROVIDE REASONING, BUT OFTEN THEY DON'T. IT IS NOT THAT SIGNIFICANT. 24

YOUR HONOR, IF THE COURT DECIDES THAT THE AGENCY HAS

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UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BLACKLIGHT POWER, INC.,) ·)
Plaintiff,	
v .)) Civil Action No. 00-00422 EGS
Q. TODD DICKINSON,)
Commissioner of Patents, United States Patent)
& Trademark Office,))
Defendant.))

DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Pursuant to Fed. R. Civ. P. 56, defendant, by his undersigned attorneys, hereby moves this Court for an order granting summary judgment in his favor on the grounds that no genuine issue as to any material fact exists and that defendant is entitled to judgment as a matter of law. In support of this motion, the Court is referred to the accompanying memorandum of points and authorities and to the accompanying statement of material facts as to which there is no genuine issue. A draft order reflecting the requested relief is also attached.

Respectfully submitted,

WILMA A. LEWIS, D.C. Bar#358637 United States Attorney

MARK E. NAGLE, D.C.Bar #416364 Assistant United States Attorney FRED E. HAYNES, D.C. Bar#165654
Assistant United States Attorney

OF COUNSEL:

KEVIN BAER
MARSHALL HONEYMAN
ERIC GRIMES
Associate Solicitors
Office of the Solicitor
U.S. Patent and Trademark Office
Arlington, Virginia

neither arbitrary nor capricious. Plaintiff's '294 application is based on theories that are not generally accepted by the scientific community. The determination that one or more claims may be unpatentable is reasonable in light of the extraordinary claims asserted by plaintiff. *In re Chilowsky*, 229 F.2d 457, 462 (CCPA 1956) (alleged inventions that conflict with recognized scientific principles are required to overcome presumption of inoperativeness).

Plaintiff's description of its invention as "conductive, magnetic plastics that will revolutionize circuitry and aerospace engineering" (Complaint ¶ 9), as capable of providing a small battery charged to move an automobile 1000 miles at highway speeds without the use of fossil fuels (Complaint ¶ 9), and as "revolutionary technology" (Exhibit 9 at 3) provide further support for the Director's decision to reopen prosecution to ensure that a potentially invalid patent does not issue. These alleged accomplishments are astonishing by themselves, but when coupled with a new theory of quantum mechanics that allegedly is based on a medical doctor/ inventor deriving a new atomic theory that unifies Maxwell's Equations, Newton's Laws, and Einstein's General and Special Relativity (Ex. 2 at col.4), the combination provides ample reasor for the USPTO to review the question of patentability.

As detailed in the accompanying statement of facts, the generally accepted understanding of the hydrogen atom is that its "ground state" is its lowest energy level and that its single electron can exist only with whole integer quantum numbers. (Ex. 1 at 210-11). In contrast to the conventional understanding of quantum mechanics, plaintiff believes that it can stimulate the hydrogen atom to go below its "ground state" and that fractional quantum numbers are possible for the hydrogen atom. These assertions are not known to the Group Director charged with examining this technology as generally accepted in the scientific community. (Ex. 5 at 5-6)

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BLACKLIGHT POWER, INC.

) C.A. NO. 00-422 (EGS)

VS.

) WASHINGTON, D.C.

MAY 22, 2000

Q. TODD DICKINSON

) 10:00 A.M.

TRANSCRIPT OF MOTIONS HEARING

BEFORE THE HONORABLE EMMET G. SULLIVAN

UNITED STATES DISTRICT JUDGE

APPEARANCES:

51

FOR THE PLAINTIFF: MICHAEL H. SELTER, ESQ.

JEFFREY A. SIMENAUER, ESQ.

JEFFREY S. MELCHER, ESO.

FOR THE DEFENDANT: FRED E. HAYNES, ESQ.

KEVIN BAER, ESQ.

COURT REPORTER: FRANK J. RANGUS, OCR

U. S. COURTHOUSE, RM. 6822

WASHINGTON, D.C. 20001

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PROCEEDINGS RECORDED BY ELECTRONIC STENOGRAPHY; TRANSCRIPT PRODUCED BY COMPUTER.

WHAT THEY ARGUE IN THEIR BELIEFS IT'S CAPABLE OF DOING, THIS 1 2 DISCOVERY. 3 MR. BAER: YOUR HONOR, BECAUSE --4 THE COURT: ARE YOU ARGUING IT'S A FRAUD ON THE 5 PUBLIC? YOU'RE NOT ARGUING THAT. YOU NEVER SAID IT WAS A 6 FRAUD. MR. BAER: YOUR HONOR, IT IS NOT -- WE DON'T BELIEVE 7 IT'S A VALID (PAUSE) -- IT'S NOT PATENTABLE BECAUSE IT'S NOT 8 VALID ACCORDING TO THE KNOWN RULES OF SCIENCE AND --9 10 THE COURT: BUT IT'S NOT FRAUDULENT, THOUGH, IS IT? 11 MR. BAER: WELL (PAUSE) --12 THE COURT: THAT'S NOT BEEN YOUR ARGUMENT UP TO THIS 13 POINT. 14 MR. BAER: NO, I DON'T THINK I WANT TO USE THE TERM "FRAUD." DR. MILLS MAY BELIEVE HE'S INVENTED SOMETHING. 15 16 DON'T BELIEVE HE'S DONE THAT AND WE'VE ASKED HIM TO COME IN AND 17 PROVE THAT, AND THEY WILL HAVE AN OPPORTUNITY TO DO THAT. THE 18 HARM IS THAT THERE IS A PRESUMPTION OF VALIDITY ATTACHED TO AN ISSUED PATENT. IT IS VERY HARD FOR A THIRD PARTY TO OVERCOME 19 20 THEY CAN EXCLUDE OTHERS FROM THE MARKET. IF SOMEONE THAT. 21 ACTUALLY INVENTS THIS, ASSUMING DR. MILLS HAS NOT INVENTED 22 THIS, IF SOMEONE COMES ALONG AND INVENTS IT IN THE FUTURE, THEY 23 COULD BE BLOCKED BY A VALID PATENT. 24 THE COURT: I SEE.

MR. BAER: SO THERE IS A HARM TO THE PUBLIC.

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POSSIBLY DO THIS?" SO THERE'S AN EXAMPLE OF A THIRD PARTY 1 2 CONTACTING US, AND THERE'S NOTHING SINISTER ABOUT THAT. JUST HOW THE AGENCY LEARNED ABOUT IT, AND THE REAL QUESTION WAS 3 4 THE DECISION, IS THE DECISION RATIONAL? 5 THE COURT: WHAT ABOUT THE REAL PREJUDICE TO THE 6 GOVERNMENT? COUNSEL MAKES A POINT. WHEN I ASKED THE QUESTION 7 BEFORE, HE SAID, WELL, THE PREJUDICE IS IF SOMEONE PRESENTS AN 8 IDENTICAL PATENT APPLICATION AND IS UNABLE TO PROVE 9 PATENTABILITY, THAT PERSON WILL BE PRECLUDED FROM RECEIVING A 10 PATENT. 11 MR. BAER: CORRECT. NOT ONLY RECEIVING A PATENT --12 THE COURT: THE GOVERNMENT'S ARGUMENT, THOUGH, IS THAT THIS INVENTION, IF IT IS ONE, CANNOT BE PATENTED BECAUSE IT'S 13 14 NOT FRAUDULENT, BUT IT'S NOT VIABLE? 15 MR. BAER: YOUR HONOR --16 THE COURT: IT'S NOT TRUE? WHAT IS IT? MR. BAER: -- IF THIS APPLICATION WAS THE CURE FOR 17 18 CANCER BUT WE DIDN'T BELIEVE THEY HAD THE CURE FOR CANCER, BUT WE ISSUED IT ANYWAYS, WHEN SOMEONE COMES ALONG FIVE YEARS FROM **19**. NOW WITH A CURE FOR CANCER, THEY WOULD BE PRECLUDED BY THIS 20 21 PLAINTIFF COULD EXCLUDE THEM FROM THE MARKETPLACE. PATENT. 22 THE COURT: RIGHT. 23 MR. BAER: YOU CAN'T PRACTICE THIS. 24 THE COURT: WHAT YOU'RE SAYING IS, THIS INVENTION 25 CONTRAVENES ALL THE KNOWN LAWS OF PHYSICS AND CHEMISTRY AND IT

SO

CAN'T, IT JUST (PAUSE) -- ARE YOU SAYING IT'S NOT TRUE? IT'S 1 2 NOT VIABLE? 3 MR. BAER: IT IS NOT KNOWN AT THIS POINT. 4 THE COURT: NOT KNOWN AT THIS POINT. RIGHT. 5 MR. BAER: BUT THAT DOESN'T MEAN --6 THE COURT: BECAUSE IT'S NOVEL. 7 MR. BAER: BECAUSE IT IS VERY NOVEL. IT IS EXTRAORDINARILY NOVEL, AND IT'S NOT TO SAY THAT THEY HAVE NOT 8 9 INVENTED SOMETHING. MAYBE THEY HAVE, BUT IT NEEDS TO GO THROUGH FURTHER ADMINISTRATIVE REVIEW. AND IF THEY TRULY 10 11 HAVEN'T DONE THIS, CREATED THIS NEW ENERGY SOURCE, BUT THEY GET A PATENT, THEY CAN PRECLUDE EVERYONE ELSE FROM EVER, FOR THE 12 13 NEXT 17 YEARS AT LEAST, FROM PROSECUTING THIS INVENTION. 14 WHEN SOMEONE COMES ALONG AND INVENTS THIS TEN YEARS DOWN THE ROAD, PLAINTIFF CAN SAY, "OH, YOU CAN'T DO THAT" OR "YOU HAVE 15 16 TO PAY ME ROYALTIES." 17 THE COURT: SO THE ANSWER TO MY QUESTION IS, THE 18 GOVERNMENT IS NOT PREJUDICED AT ALL. YOU JUST ANTICIPATE 19 PREJUDICE TO SOMEONE ELSE IN THE FUTURE IF SOMEONE ELSE IS ABLE 20 TO DEMONSTRATE THAT THE ENERGY SOURCE EXISTS. 21 MR. BAER: THE PREJUDICE WOULD ALSO BE, WE'D BE 22 -ORDERED TO ISSUE A PATENT THAT WE DO NOT BELIEVE AT THIS POINT 23 IS PATENTABLE, AND THAT IT'S NOT A REGISTRATION SYSTEM AT THE 24 PATENT AND TRADEMARK OFFICE. CONGRESS HAS CHARGED THE DIRECTOF

WITH EXAMINING PATENT APPLICATIONS, AND THAT'S WHAT WE'RE

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IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BLACKLIGHT POWER, INC.)	
Plaintiff,)	
v.)	No. 00 0422 EGS
Q. TODD DICKINSON, Commissioner of Patents)	
Defendant.))	

REPLY IN SUPPORT OF PLAINTIFF'S MOTION TO AMEND THE SCHEDULING ORDER

I. The Court Should Reject the Patent Office's Attempt
To Raise Issues Outside of the Administrative Record.

Plaintiff's present Motion to Amend the Scheduling Order seeks an extension to provide the Court sufficient time to reach a decision on the merits of the parties' pending cross-motions for summary judgment and an opportunity for either party to move for a stay pending any appeal that might be taken from that decision. The posture of this case awaiting summary judgment did not just happen by accident. Rather, it resulted from the parties' negotiated settlement in which BlackLight agreed to withdraw its previously-filed application for a temporary restraining order and preliminary injunction in exchange

Plaintiff proposed that the stay extend ten days after any judgment to allow the losing party (whether it be Plaintiff or the Patent Office) to seek a stay pending appeal. The extra ten days was for both parties' convenience because Plaintiff believed that pending any appeal, the Patent Office would not want to be directed to issue a patent, just as Plaintiff would not want an adverse office action to issue. Thus, contrary to the Patent Office's argument (Def. Opp. 4), the extra ten days suggests nothing about Plaintiff's belief in the strength of its case.

As previously noted in Plaintiff's patent counsel's Declaration executed on April 4, 2000, Group Director Kepplinger told him that Director Dickinson directed her to review the '294 application after he received communications from undisclosed thirdparty sources. Exhibit 1 to Plaintiff's Motion for Summary Judgment. Although Group Director Kepplinger did not at that time disclose the third-party source, Plaintiff has done some discovery of its own and now knows why it is no coincidence that the Patent Office relied so heavily on the statements of Dr. Park, a physicist with the American Physical Society (APS), in its March 22 Decision, as this was not the first time the two have had close ties. As the Court may recall, another physicist, Dr. Peter Zimmerman, Chief Scientist for the U.S. Department of State, published an Abstract for an upcoming speech to be delivered to the APS boasting that the State Department and the Patent Office "have fought back with success" against BlackLight. Plaintiff's Reply in Support of its Motion for Summary Judgment, at 2 n.1. In an interview with Dr. Zimmerman to find out the source of those comments, he claimed to be only a "receiver" of information, not a "donor" and that it was Dr. Park who has had contact with someone in the Patent Office that Park specifically refers to as "Deep Throat." July 10, 2000, Letter to Thomas Heinemann, Esq., from Jeffrey A. Simenauer, Esq. (Exhibit 1 hereto).

While the dispute about what led to Group Director Kepplinger's review should have no bearing on the Court's decision on the pending motions for summary judgment, it does help explain why the Patent Office is now anxiously searching for some other excuse to justify its procedural missteps.



Session J12 - FPS Awards Session-Business Meeting.

MIXED session, Sunday afternoon, April 30

101B, Long Beach Convention Center

[J12.001] <u>Touching the Third Rail: Encounters with Pseudoscience and Pseudoscientists</u>

Peter D. Zimmerman (United States Department of State, Washington, DC 20520)

Pseudoscience, and particularly "pseudophysics" is alive and thriving as we approach the turn of the millennium. Not only have many "inventors" of cold fusion spin-offs been making money from investors, but they and "inventors" of various kinds of "zero point energy" devices, perpetual motion machines, and other wonders such as "hydrinos" have found friends in the United States Senate. At least one Nobel Laureate in physics has come to their aid. The Web has been a powerful organizing force as well.

Some organizations, including my own Department and the Patent Office have fought back with success, but always at great cost in time and energy. Pseudophysicists and their friends have money, influence, and sometimes clout. They have not hesitated to use threats, personal attacks, and the full machinery by which government is made accountable to the public to strike at those who expose technical fraud. Encounters with pseudophysicists are like grabbing a hot wire: after the first contact it is hard to get free, and it can inflict serious injury. But you, and I, and all our colleagues in the APS must do what we can to ensure that U.S. policy is not manipulated by pseudoscience, to make certain that taxpayer money is not wasted on nonesense, and to restore public confidence in real science. This will take efforts at public education, work, and as I have learned in the last year not a little bit of courage. APS and FPS should be in the thick of the battle. This talk is an account of a year in the fray.

n Part J of program listing

LAW OFFICES OF

JEFFREY A. SIMENAUER

2000 M STREET, N.W., SUITE 700 WASHINGTON, D.C. 20036-3307 TELEPHONE: (202) 833-0806 FACSIMILE: (202) 463-0823

July 10, 2000

VIA FACSIMILE & U.S. MAIL

Thomas Heinemann, Esq.
Attorney Advisor
United States Department of State
Office of the Legal Advisor
2201 C Street, N.W.
Washington, DC 20520

Re: BlackLight Power, Inc.

Dear Mr. Heinemann:

This letter documents separate telephone conversations we had with you and Dr. Zimmerman last Friday, July 7, 2000.

We first telephoned you after having received the June 26, 2000 letter that you transmitted from James Thessin, Deputy Legal Advisor for the Department of State. In his letter, Mr. Thessin advises that the State Department sees no basis for liability on its part in the matter involving Dr. Peter Zimmerman referred to in our prior correspondence, dated May 12, 2000. Mr. Thessin further represents that Dr. Zimmerman did not give the speech at the APS conference and, based on what Dr. Zimmerman told him, did not contact the Patent Office regarding the intellectual property rights of BlackLight Power.

Even if it were true that Dr. Zimmerman did not himself contact the Patent Office, we have good reason to believe that he knows who did. That, together with Dr. Zimmerman's Abstract of his speech at the APS conference, which boasts that the State

Thomas Heinemann, Esq. July 10, 2000 Page 2 of 4

Department and the Patent Office "have fought back with success" against BlackLight, certainly suggests that the State Department has played a role in this matter. The purpose of our May 12 letter was to explore the precise nature of that role and, to that end, we requested that you provide us with certain-information that might lead to an amicable resolution of this matter.

Given the serious implications of Dr. Zimmerman's Abstract, and our good-faith offer to resolve this matter, we certainly expected more than the "brush off" we received from Mr. Thessin. His condescending declaration that the State Department "considers the matter to be closed," while making your position perfectly clear, simply ignores the reality and gravity of the situation and will not make it go away.

In view of that position, we specifically inquired during Friday's phone conversation with you whether anyone at the State Department was serving as counsel for Dr. Zimmerman in this matter and, if not, whether you had any objections to our contacting Dr. Zimmerman directly to confirm the statements by Mr. Thessin in his letter. You said that you had no objection to our speaking with Dr. Zimmerman since, in your words, there was no actionable matter and, therefore, no need for the State Department to provide him with counsel. When I asked you for Dr. Zimmerman's inter-office phone number where he could be reached, you said you did not have his number readily available and suggested that I retrieve it through the State Department's general information number.

Based on your response to my request to speak with Dr. Zimmerman, we immediately telephoned him to see if he would be willing to speak with us in his individual capacity in an attempt to resolve this matter amicably with him. At the very outset of our conversation, we informed Dr. Zimmerman that we had just spoken to you and that you had no objections to our calling him. We even suggested that he could check with you first before discussing the matter with us and also that he was free to consult with his own chosen representative before doing so. Dr. Zimmerman confirmed your earlier statement that he was not being represented by counsel for the State Department, or any other counsel, and we then proceeded with our conversation:

Dr. Zimmerman seemed anxious to put this matter behind him. He claimed that he was only a "receiver" of information, not a "donor," and repeated what Mr. Thessin states in his letter, namely that he did not contact anyone in the Patent Office regarding the intellectual property rights of BlackLight Power. Dr. Zimmerman also admitted that some of the information he received included e-mails from Dr. Park of the APS and that Dr. Park had told him of a contact in the Patent Office Dr. Park refers to as "Deepthroat." Unfortunately, our discussion was abruptly cut short when Dr. Zimmerman informed us that he had just received an e-mail from you advising him not to speak with us and that we would therefore have to end our conversation.

Thomas Heinemann, Esq. July 10, 2000 Page 3 of 4

Your advice that Dr. Zimmerman cease all communications with us came somewhat as a surprise given your earlier consent to our speaking with him. In addition, your prior representations referenced in our May 12 letter that Dr. Zimmerman was acting in his individual capacity and not on behalf of the State Department regarding matters reflected in the APS Abstract would appear to be in direct conflict with your advising him on whether to communicate with us.

Be that as it may, we will certainly abide by your wishes and will have no further communications with Dr. Zimmerman on this matter until we hear from either you or him that we are again free to do so. Assuming, however, for the sake of argument only that Dr. Zimmerman was being truthful regarding his passive role in this matter, we find it incredible that you would not want to convey that information so as to put this matter behind us. Your muzzling of Dr. Zimmerman only creates a heightened suspicion that, perhaps, the State Department does indeed have something to hide and that there is a basis for liability as the APS Abstract and other evidence in our possession suggests.

Should the State Department decide to change its position and reopen this matter to consider our request for information known to be in its possession, we stand ready to take this matter up with you again. Should you decide instead to maintain your present position, giving us no choice but to secure this information through formal discovery in a legal proceeding, we are prepared to take that alternative course of action as well.

In either case, we assume you will take all necessary steps to preserve the information we are seeking, including but not limited to any e-mails or other communications Dr. Zimmerman or other State Department officials have had with Dr. Park or others regarding BlackLight's intellectual property rights. We are also particularly interested in preserving all information that may be in your possession or under your control relating to Dr. Park's "Deepthroat" contact in the Patent Office.

In the meantime, we have requested that Dr. Zimmerman, after further consultation with you and/or a chosen legal representative, advise us whether or not we can expect to continue our conversation to see if we can reach an amicable resolution of this matter, at least with respect to him in his individual capacity.

Thomas Heinemann, Esq. July 10, 2000 Page 4 of 4

Given your instruction to Dr. Zimmerman to cease all communications with us, we kindly request that your provide a copy of this letter to him, as well Mr. Thessin. Thank you.

Sincerely,

leffrey A. Simenauer, Esq.

Law Offices of Jeffrey A. Simenauer

2000 M Street, 7th Floor

Washington, D.C. 20036-3307

Jeffrey S. Melcher, Esq. Farkas & Manelli, PIIC

2000 M Street, 7th Floor

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cc: Dr. Peter Zimmerman (via Thomas Heinemann)

Mr. James Thessin, Esq. (via Thomas Heinemann)

Ms. Jamison Borek, Esq.

Dr. Shelby Brewer

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What's New

by Bob Park

The American Physical Society

Friday, 18 August 2000 Washington, DC

1. NULL HYPOTHESIS: DO ASTRONAUTS SUFFER MAGNETIC DEFICIENCY?

I must tell you, I bought a pair of Florsheim MagneForce shoes this week (WN 11 Aug 00). I have not been sick since. More on my new shoes in a later issue. Today, I want to share another Gary Null quote from the free brochure Florsheim gave me (at \$125 the shoes were not free): "90-95% of health problems astronauts experienced after early space flights were eliminated when magnets were put in space suits and space capsules to counter the effects of traveling outside the earth's magnetic field." That's remarkable, since early flights never got beyond low-Earth orbit where the field is essentially unchanged. Nevertheless, we felt obliged to ask NASA. Answer: There has never been a magnet in a space suit.

2. BLACKLIGHT: SUIT AGAINST THE PATENT OFFICE FAILS.

BlackLight Power's plans to go public with an estimated \$1B stock offering are presumably on hold. You may recall that on 15 Feb BLP was awarded a patent on a process for putting hydrogen atoms into a "state below the ground state," shrinking them into teeny little things called "hydrinos" (WN 18 Feb 00). A second patent dealing with hydrino chemistry was set for issuance two weeks later. But on 17 Feb the Patent Office withdrew the second patent, and opened up the first for reexamination. One patent official was concerned that the BLP technology involves perpetual motion and "cold fusion." With its intellectual property somewhere in patent purgatory, BlackLight filed suit in Federal Court against the Commissioner of Patents. Tuesday, Judge Emmet Sullivan ruled the Patent Office action was "neither arbitrary nor capricious."

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

)	
BLACKLIGHT POWER, INC.	ý	
•)	
Plaintiff,)	
)	No. 00 0422 EGS
· v.)	•
)	
Q. TODD DICKINSON,)	•
Under Secretary)	
and Director of Patents)	•
)	
Defendant.	,)	

DECLARATION OF ESTHER M. KEPPLINGER

I, Esther M. Kepplinger, declare and state:

- 1. I am presently employed by the United States Patent and Trademark Office ("USPTO"), and at all times relevant to the matters contained in this declaration, I served as the Director for Technology Center 1700. If called as a witness, I would testify as follows:
- 2. On Thursday, February 24, 2000, I received a call from Jeffrey Melcher, the attorney for the applicant on application 09/009,294 ("the '294 application"). Mr. Melcher indicated that he had received a Notice dated February 17, 2000 stating that the '294 application had been withdrawn from issue. I indicated to Mr. Melcher that I was the person that was responsible for the withdrawal.
 - 3. Four days later, Monday, February 28, 2000, Mr. Melcher came to my office. I



explained to Mr. Melcher that I was extremely concerned about the application because it was based on the concept of an electron going to a lower orbital in a fashion that is contrary to the known laws of physics and chemistry. I also may have said that the questionable sciences alleged in patent number 6,024,035 and the '294 application were similar to other questionable sciences such as "cold fusion" and "perpetual motion", but I did not tell Mr. Melcher that my concerns relating to the '294 application were based solely on the concepts of "cold fusion" and/or "perpetual motion." My main concern was the proposition that the applicant was claiming the electron going to a lower orbital in a fashion that I knew was contrary to the known laws of physics and chemistry.

- 4. Mr. Melcher then questioned me as to whether Commissioner Q. Todd Dickinson was involved in the decision to withdraw the '294 application. I specifically stated to Mr. Melcher that Commissioner Dickinson had nothing to do with the initial decision to withdraw the application. I told him that I alone made the decision to withdraw the application based on patentability concerns. At no time did I tell Mr. Melcher that Commissioner Dickinson directed me or anyone else to withdraw the application from issue.
- _5. I did not discuss my decision to withdraw the application with any person outside the USPTO. No one directed me to make the decision to withdraw the '294 application.
- 6. Contrary to Mr. Melcher's assertion, my decision was not based in whole or in part on any "perceived 'heat'" the USPTO had received from an undisclosed, outside source.
- 7. The decision to withdraw the application was based solely on the patentability standards contained in Title 35 of the United States Code.
- 8. Mr. Melcher and I discussed four other applications by the same applicant that had gone to issue. I told Mr. Melcher that I was "pulling" these applications back from their locations so that I could take a look at them. I did not tell Mr. Melcher that I was going to withdraw these cases from issue. I told him that, unlike the sense of urgency regarding the '294 application, I still

had time to obtain the other four application files for review without withdrawing them from issue. I explained that the reason I hadn't done the same with the '294 application is that it was much closer to its issue date than the other four applications.

I DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE UNITED STATES OF AMERICA THAT THE FOREGOING IS TRUE AND CORRECT.

1/14/00 Date

Esther M. Kepplinger

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA



BLACKLIGHT POWER, INC.) <u>C.A.</u> NO. $00-422$ (E	GS)
)	
VS.) WASHINGTON, D.C.	
) MAY 22, 2000	
Q. TODD DICKINSON) 10:00 A.M.	

TRANSCRIPT OF MOTIONS HEARING

BEFORE THE HONORABLE EMMET G. SULLIVAN

UNITED STATES DISTRICT JUDGE

APPEARANCES:

FOR THE PLAINTIFF: MICHAEL H. SELTER, ESQ.

JEFFREY A. SIMENAUER, ESQ. JEFFREY S. MELCHER, ESQ.

FOR THE DEFENDANT: FRED E. HAYNES, ESQ.

KEVIN BAER, ESQ.

COURT REPORTER: FRANK J. RANGUS, OCR

U. S. COURTHOUSE, RM. 6822

WASHINGTON, D.C. 20001

(202) 371-0545

PROCEEDINGS RECORDED BY ELECTRONIC STENOGRAPHY; TRANSCRIPT PRODUCED BY COMPUTER.

SOMETHING FOCUSED HER ATTENTION ON THE 935 PATENT AND THE 1 TIMING OF THE 294 PATENT IS JUST, IT'S NOT JUST COINCIDENTAL. 2 3 IT WAS ABOUT TO ISSUE. MR. BAER: WELL, IT WAS ABOUT TO ISSUE, YOUR HONOR, 4 BUT WHAT HAPPENED IS, I DON'T KNOW, TO ANSWER YOUR QUESTION . 5 DIRECTLY, I DO NOT KNOW HOW THE DIRECTOR BECAME AWARE THAT WE 6 7 ISSUED A --8 THE COURT: DOESN'T THE COURT NEED TO KNOW THAT IN AN EFFORT TO DETERMINE WHETHER THE ACTIONS OF THE GOVERNMENT ARE 9 10 INDEED ARBITRARY AND CAPRICIOUS? 11 MR. BAER: I DON'T BELIEVE SO, YOUR HONOR, BECAUSE THE ISSUE IS, IS THERE A SCIENTIFIC BASIS, A REASONABLE SCIENTIFIC 12 BASIS, TO WITHDRAW IT? AND IS THAT ARBITRARY AND CAPRICIOUS? 13 PLAINTIFF DOESN'T EVEN CHALLENGE THE REASONABLENESS. 14 NOW, THEY HAVE SOME PROCEDURAL ISSUES THEY ARGUE WITH, BUT THE ACTUAL 15 ISSUES OF THE SCIENTIFIC CONCERNS, THEY DO NOT CHALLENGE. 16 THEY ADMIT THAT THIS IS NOVEL SCIENCE, THIS IS UNKNOWN. 17 THEY SAY IT 18 THEY SAY IT'S DIFFERENT, THAT THEY HAVE TAKEN QUANTUM WORKS. 19 MECHANICS TO A NEW LEVEL. 20 THE COURT: SO NO ONE, THE PLAINTIFFS ARE NOT ASKING THE COURT TO FOCUS ON THE REASON'S LEADING UP TO OR THE FACTS OR 21 CIRCUMSTANCES LEADING UP TO THE DIRECTOR'S CONSIDERATION OF THE 22 23 935 PATENT? 24 MR. BAER: I DON'T BELIEVE SO. THEY WITHDREW THAT. 25 THE COURT: NO ONE IS CASTING ANY SINISTER ALLEGATIONS

(PAUSE) --

MR. SELTER: WE'RE SAYING FOR PURPOSES OF THE MOTION
FOR SUMMARY JUDGMENT, SINCE THEY DISPUTE IT IN THEIR AFFIDAVIT,
WE ARE NOT RAISING THAT AS A POINT, BUT WE DO BELIEVE THAT IT
OCCURRED. AND SIGNIFICANTLY, I'VE YET TO HEAR FROM MR. BAER.
I MEAN, IT'S A FACT IT'S DISPUTED, BECAUSE WE WANT A DECISION
ON --

THE COURT: YOU CAN'T HAVE IT BOTH WAYS, COUNSEL.
YOU'RE NOT RAISING IT AS A POINT. CORRECT?

MR. SELTER: WE'RE NOT RAISING IT AS A POINT.

THE COURT: ALL RIGHT.

MR. SELTER: BUT WE WILL NEED A DECISION TO BE RESOLVED FOR PURPOSES OF THE SUMMARY JUDGMENT.

THE COURT: I JUST WANT THE RECORD CLEAR ON THAT.

ALL RIGHT, THANK YOU.

ALL RIGHT.

MR. BAER: YOUR HONOR, EVEN --

THE COURT: IT'S NOT A POINT.

MR. BAER: OKAY. I WOULD EVEN SAY, YOUR HONOR, YOU

COULD IMAGINE IN YOUR HEAD ANY SCENARIO OF HOW WE LEARNED ABOUT

IT. A BLIMP FLYING OVER US. IT DOESN'T MATTER, BECAUSE WHAT

MATTERS, YOUR HONOR, IS THE DECISION ITSELF. IS THERE A

REASONABLE, NON-ARBITRARY REASON BASED ON THE SCIENCE, BASED ON

THE PATENTABILITY, TO WITHDRAW THIS APPLICATION FROM ISSUE?

THE ANSWER IS YES. PLAINTIFF DOES NOT CHALLENGE THAT.

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BLACKLIGHT POWER, INC.)	
Plaintiff,)	Civil Action No. 00 CV 0422 (EGS)
v .)	00 C V 0422 (EGS)
Q. TODD DICKINSON)	·
Director of the United States)	
Patent and Trademark Office)	
Defendant.)	

DEFENDANT'S OPPOSITION TO PLAINTIFF'S MOTION TO AMEND THE SCHDEDULING ORDER

Defendant, Q. Todd Dickinson, Director of the United States Patent and Trademark

Office ("Director"), respectfully opposes plaintiff's motion for an open-ended stay because no
further stay is warranted and any additional stay will serve as an unjustified restraint against lawful
government activity. Although plaintiff fails to ask properly for a preliminary injunction, plaintiff
is seeking, in effect, a preliminary injunction against the United States. The motion should be
denied for three independent reasons. First, plaintiff's failure to seek a preliminary injunction
under Federal Rule of Civil Procedure 65 should summarily preclude the relief requested.

Second, assuming that this Court treats plaintiff's motion to amend the scheduling order as a
proper motion for a preliminary injunction, then the motion should be denied because plaintiff has
failed to articulate any basis for a preliminary injunction. Last, if this Court reviews the merits of
a theoretical request for a preliminary injunction, then a preliminary injunction should be denied

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Marshall Honeyman 305-4

U.S. Patent and Trademark Office

109 F.Supp.2d 44 55 U.S.P.Q.2d 1812

(Cite as: 109 F.Supp.2d 44)

United States District Court.
District of Columbia.

BLACKLIGHT POWER, INC., Plaintiff,

Q. Todd DICKINSON, Commissioner of Patents and Trademarks, Defendant.

Civil Action No. 00-422(EGS).

Aug. 15, 2000.

Patent applicant challenged Patent Office's decision to withdraw application after payment of issue fee. On cross-motions for summary judgment, the District Court; Sullivan, J., held that: (1) Patent Office had statutory authority to withdraw issued patent after payment of issue fee, and (2) withdrawal was not abuse of discretion.

Plaintiff's motion denied; defendant's motion granted.

West Headnotes

[1] Patents = 114.17 291k114.17

Patent Office's interpretation of patent issuance statute is due *Chevron* deference. 35 U.S.C.A. § 151.

[2] Patents \$\infty\$ 107 291k107

Patent Office had authority, under its statutory mandate to issue only patent to which applicant is entitled, to withdraw application even after applicant has paid issue fee. 35 U.S.C.A. § 151.

[3] Patents \$\infty\$107 291k107

Patent Office regulation authorizing withdrawal of issued patent upon determination of unpatentability was reasonable application of statutory mandate to issue only patent to which applicant was entitled. 35 U.S.C.A. § 151; 37 C.F.R. § 1.313(b).

[4] Patents @=112.2 291k112.2 Patent Office decision refusing to rescind notice of patent withdrawal, rather than notice of withdrawal itself, was final agency action, for purposes of judicial review.

[5] Patents \$\infty\$107.

Patent Office decision to withdraw patent application after payment of issue fee, upon determination that it raised substantial question of patentability, was not arbitrary or capricious, even though regulation allowed withdrawal only upon determination of unpatentability; Patent Office was entitled to withdraw application and return it to examiner for determination of patentability. 5 U.S.C.A. § 706(2); 37 C.F.R. § 1.313(b)(3).

Patents @=328(2) 291k328(2)

6,024,935. Cited.

*45 Michael H. Selter, Farkas & Manelli, P.L.L.C., Jeffrey Allan Simenauer, Washington, DC, for Plaintiff.

Fred E. Haynes, U.S. Attorney's Office, Washington, DC, Kevin Gerard Baer, Patent & Trademark Office, Office of the Solicitor, Arlington, VA, for Defendant.

MEMORANDUM OPINION AND ORDER

SULLIVAN, District Judge.

I. Introduction

Plaintiff Blacklight Power, Inc., alleges that defendant Q. Todd Dickinson, Commissioner of the Patent and Trademark Office (PTO), violated the Administrative Procedure Act (APA), 5 U.S.C. § 706 et seq., when the PTO withdrew one and threatened to withdraw four others of plaintiff's patents from issue after plaintiff had received a "Notice of Allowance and Issue Fee Due" and payed the issue fee. The issues presented are whether the defendant had the authority to withdraw plaintiff's patent after plaintiff had paid the issue fee, and, if defendant did have the authority, whether that withdrawal was arbitrary and capricious. Plaintiff

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reverse the PTO's withdrawal decision. decision issued March 22, 2000 (March 22 Decision), defendant denied plaintiff's petition, refused to rescind the February 17 Notice, and disallowed plaintiff's patent. See Pl.'s Mot. for Summ. J., Ex. 8. The March 22 Decision indicated that the reason behind the withdrawal of the '294 application was its similarity to the '935 patent, both of which claimed to attain energy levels below the ground state according to a "novel atomic model." See Pl.'s Mot. for Summ. J., Ex. 8 at 2. Both claim that the electron of a hydrogen atom can attain an energy level and orbit below the 'ground state' corresponding to a fractional quantum number. According to defendant, this assertion alarmed the Director, who had *47 examined the '935 patent, and who had learned of the '292 application, because it "did not conform to the known laws of physics and chemistry." Id. The March 22 Decision states that the Director "was immediately aware that any pending application embodying such a concept raise [d] a substantial question of patentability of one or more claims which would require reopening prosecution." Id.

III. Procedure

Plaintiff filed this lawsuit on March 1, 2000. Plaintiff's complaint consists of two counts. Count I seeks preliminary and permanent injunctive relief directing defendant to issue the five contested patents-in-application as patents. Count II seeks a declaratory judgment that defendant's withdrawal of the patent applications was arbitrary and capricious and contrary to the PTO's own regulations and to the applicable patent issue statute. Plaintiff filed its motion for a temporary restraining order and preliminary injunction on March 2, 2000. At their March 3, 2000 hearing, the parties agreed that plaintiff would withdraw its motion without prejudice, and defendant would not take any Office Action with respect to the patents-in-application. On March 8, 2000, the Court issued an order memorializing that agreement, and setting a briefing schedule. Defendant filed the administrative record on March 22, 2000. The parties filed their cross motions for summary judgment on April 4, 2000. They filed their responses in opposition on April 18, 2000. Plaintiff filed its reply in support on May 1. 2000, and defendant filed its reply in support on May 5, 2000. The Court held a motions hearing on the cross motions for summary judgment on May 22, 2000.

IV. Discussion

The Court must examine several questions to resolve the pending cross motions. First, the Court must determine whether defendant has the authority to withdraw plaintiff's patent after plaintiff has paid the issue fee. If the Court determines that the PTO did possess the requisite authority, then the Court must conclude which PTO issuance, the February 17 Notice or the March 22, 2000 Decision, constitutes final, reviewable agency action. As the last step, the Court must determine whether that final agency action was arbitrary and capricious in contravention of the APA.

A. Whether the PTO Has the Authority To Withdraw Plaintiff's Patent After Payment of the Issue Fee

Plaintiff argues that the PTO does not have the authority to withdraw plaintiff's patent after payment of the issue fee for three reasons: 1) because doing so violates the plain language of the statute, 2) because the PTO regulation on which defendant bases its authority violates the plain language of the statute, and 3) because case law directs defendant to issue the patent upon payment of the fee.

1. Patent Issuance Statute: 35 U.S.C. § 151

The parties interpret 35 U.S.C. § 151, the statute governing the issuance of patents, to support their respective positions by focusing on different sections of the statute. 35 U.S.C. § 151 provides in relevant part:

If it appears that applicant is entitled to a patent under the law, a written notice of allowance of the application shall be given or mailed to the applicant. The notice shall specify a sum, constituting the issue fee or a portion thereof, which shall be paid within three months thereafter. Upon payment of this sum the patent shall issue, but if payment is not timely made, the application shall be regarded as abandoned. 35 U.S.C. § 151 (emphases added).

Plaintiff focuses on the italicized language directing that "[u]pon payment of [the issue fee] the patent shall issue." It is well-established that "shall" is the "language of *48 command." Boyden v. Commissioner of Patents, 441 F.2d 1041, 1042 n. 3

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application;

(3) unpatentability of one or more claim: ... 37 C.F.R. § 1.313(b) (emphasis added).

The gravamen of plaintiff's regulatory argument is that the issue before the Court is not whether the PTO is obligated to determine a claim's patentability, but when it must make this determination. Plaintiff argues that § 151 and its legislative history indicate that the PTO must make this determination before issuance of the notice of allowance and payment of the issue fee. [FN4]

FN4. Plaintiff compares § 151 to 35 U.S.C. § 303, the patent reexamination statute, which allows reexamination of a patent only if there is a "substantial new question of patentability." The Federal Circuit, dismissing the PTO's reliance on its Manual of Patent Examining Procedure (MPEP), held that this statute does not allow reexamination of patent claims on ground considered before the patent was issued, even though reexamination might reveal that the requirements for patentability had not been met. In re Recreative Technologies Corp., 83 F.3d 1394, 1397 (Fed.Cir.1996).

Defendant counters that the PTO has long had the discretion to withdraw a patent even after payment of the issue fee on unpatentability grounds. Subsection (3) was added to 37 C.F.R. § 1.313(b) in 1982. However, even before the addition of the "unpatentability" language, the PTO had the discretion to withdraw applications from issue on the basis of "mistake on the part of the Office" or subsection (1). The mistake ground was consistently held to envelop subsequently discovered reasons undermining an application's patentability. See, e.g., Hull v. Commissioner of Patents, 9 D.C. (2 MacArth.) 90 (1875)(denying writ of mandamus requesting issue of withdrawn patent). defendant argues that the Director has not only the discretion but the duty to withdraw a patent from issue if there is a question about its patentability. See In re Alappat, 33 F.3d 1526, 1535 (Fed.Cir.1994)(en banc)(plurality opinion) (holding that the "Commissioner has an obligation to refuse to grant a patent if he believes that doing so would be contrary to law").

As for the standard of review of the PTO's adoption of 37 C.F.R. § 1.313(b), its own regulation, plaintiff offers two arguments to support its contention that the Court's review should be

more searching and less deferential. First, plaintiff argues that 37 C.F.R. § 1.313(b) does not have the force and effect of law, because the PTO does not have substantive rulemaking powers outside of its own regulations, [FN5] and so the regulations are not entitled to the Court's deference.

FN5. 35 U.S.C. § 6 empowers the Commission to "establish regulations, not inconsistent with law, for the conduct of proceedings in the Office." Accordingly, the Commissioner may issue only those regulations concerning the conduct of PTO proceedings.

Alternatively, plaintiff avers that, even if the Court were persuaded that deference is owed § 1.313(b) because it concerns patent proceedings, the regulation still cannot be "inconsistent with law," and under this standard, § 1.313(b) is invalid. Even where an agency's interpretation is entitled to deference. "the courts are the *50 final authority on the issue of statutory construction. They must reject administrative constructions, whether reached by adjudication or by rulemaking, that are inconsistent with the statutory mandate or that frustrate the policy Congress sought to implement." FEC v. Democratic Senatorial Campaign Comm., 454 U.S. 27, 32, 102 S.Ct. 38, 70 L.Ed.2d 23 (1981). Here. plaintiff claims, Congress has explicitly spoken to the salient issue, and so the court "must give effect to the unambiguously expressed intent of Congress." Brown & Williamson Tobacco Corp., 529 U.S. 120, 120 S.Ct. 1291, 1299, 146 L.Ed.2d 121 (2000).

Defendant maintains that Chevron deference is appropriate here as well, on several grounds. First, as noted above, defendant argues that this regulation is due great deference because it was propounded pursuant to a statute that the PTO Director is charged with administering. See Udall v. Tallman, 380 U.S. 1, 16, 85 S.Ct. 792, 13 L.Ed.2d 616 (1965). Second, defendant argues that the Court must "accord[] considerable weight to the prior long-standing interpretation, if reasonable, of the agency charged with administering a regulatory scheme," see Crast Machine Works, Inc. v. United States, 926 F.2d 1110, 1114 (Fed.Cir.1991), and that 35 U.S.C. § 151 and 37 C.F.R. § 1.313(b) have co-existed without incident under that "prior longstanding interpretation." [FN6]

FN6. The PTO has interpreted the "shall issue" language as allowing the withdrawal of a patent

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might well be enhanced by strict and merciful cutoff of Patent and Trademark Office consideration of an individual patent application once notice and payment have been effected, particularly one that has been so prominent and protracted as Sampson's." Id.

Unlike the Brenner and Gypsum courts, the Sampson court considered the issue presented in the present case: whether defendant has the authority to refuse to issue a patent once the issue fee has been paid. Accordingly, defendant addresses it by citing a more recent case from this court, Harley v. Lehman, 981 F.Supp. 9 (D.D.C.1997), which also considered the issue in the present case, but which discounts the Sampson case because of a subsequent change in the PTO's implementing regulations.

Harley is factually and procedurally identical to the present case. In Harley, plaintiff's application was allowed, plaintiff paid the issue fee, and a patent number and issue date were set. Just five days before the issue date, pursuant to 37 C.F.R. § 1.313(b)(3), the PTO withdrew the application, because a PTO director became concerned about the possible unpatentability of the application's claims. The applicant sued in district court, asserting, as Blacklight does, that the Commissioner lacked the statutory authority to withdraw the patent once the issue fee had been paid. The Harley court held that the PTO regulation allowing withdrawal of a patent from issue based on unpatentability was a reasonable interpretation of 35 U.S.C. § 151. The court also noted the historic coexistence of the ostensibly vying statutes as further proof that the PTO's interpretation was reasonable.

*52 The Harley court specifically discounted the Sampson case. Like Blacklight, the Harley plaintiff The Harley court held, relied on Sampson. however, that "[p]laintiff's reliance on Sampson v. Dann ... is misplaced [because t]he regulation at issue in this case had not yet been enacted when Sampson was decided." [FN8] Harley, 981 F. Supp. at 12 n. 3. The Sampson court considered the interplay between 35 U.S.C. § 151 and 37 C.F.R. § 1.313(b) before the unpatentability ground, or subsection (3), had been added to the latter provision. Accordingly, the provision allowed the PTO to withdraw the patent after payment of the issue fee only in cases of (1) a mistake on the part of the Office, and (2) a violation of § 1.56 [fraud] or illegality in the application. The Sampson court held that, since there was evidence of neither mistake nor fraud, the PTO was legally bound to issue plaintiff's patent. Defendant's argument on this score, therefore, is double-edged: not only is Sampson totally void of persuasive authority here, but Harley is controlling. [FN9]

FN8. When Sampson was decided in 1978, the PTO's regulations did not expressly allow withdrawal on the basis of unpatentability after payment of the issue fee. The regulation was amended in 1982 specifically to allow withdrawal from issue on the basis of "unpatentability of one or more claims." See 37 C.F.R. § 1.313(b)(3).

FN9. At the May 22, 2000 hearing, plaintiff argued that there actually is no functional between the Sampson court's consideration of the pre-subsection (3) regulation and the Harley court's consideration of the postsubsection (3) regulation. See May 22, 2000 Hr'g Tr. at 63. Plaintiff argued that, in Harley, the PTO indicated that they relied on the mistake exception to justify the withdrawal of the Harley plaintiff's patent, and that the mistake was the unpatentability of plaintiff's claim. In other words, plaintiff argues defendant slid subsection (3) unpatentability under subsection (1) exception. Therefore, both courts were actually considering the same subsection-subsection (1)--and the fact that subsection (3) had been passed is of no consequence. Id. The Court disagrees. Harley opinion clearly indicates that subsection (3). and not subsection (1), was at issue. See Harley, 981 F.Supp. at 9, 11.

The Court finds that Harley, and not Sampson, is the more persuasive authority. First, the Sampson opinion, in a crucial section, includes language that effectively approvingly presages the addition of subsection (3):

It may be that fraud by the applicant, or even good cause for the failure by the Patent and Trademark Office to discover the prior art earlier would justify a courtfashioned exception to the statutory command. For example, Patent and Trademark Office custom might have established and Congress might have accepted such an exception. But the Patent and Trademark Office has failed to offer any persuasive proof of such a custom or its acceptance by Congress. Moreover, there is a substantial difference between fraud or other questionable action by an applicant which might justify such an exception and the receipt of prior

109 F.Supp.2d 44 (Cite as: 109 F.Supp.2d 44, *53)

be withdrawn only upon a finding of unpatentability, not upon a possibility of unpatentability. But, plaintiff points out, the March 22 decision indicates that the February 17 notice was issued at the PTO Director's request because she believed that Blacklight's applications "raise[d] a substantial question of patentability on one or more claims." March 22 Decision at 2. Therefore, by defendant's *54 own admission, the PTO has not made a final determination on unpatentability, and so acts in violation of its own regulations, and the APA.

Defendant responds that plaintiff makes this argument about PTO regulations without citing any authority. On the other hand, defendant's own Manual of Patent Examining Procedure (MPEP) § 1308.1 makes clear that withdrawal on the basis of unpatentability after payment of the issue fee is a 2-step process: first, "the actual withdrawal will be handled by the Office of Patent Publications and then the application will be returned to the examiner" and the unpatentable claims are rejected. Defendant further points out that this interpretation of the PTO regulation was upheld in *Harley*, in which the applicant's claims were not formally rejected until 6 months after his application had been withdrawn from issue. *Harley*, 981 F.Supp. at 12.

The Court is persuaded by the defendant's argument. The unpatentability subsection functions as a last-chance procedural measure to enable defendant to observe the PTO's central mandate of issuing viable patents. It is not a final pronouncement of unpatentability. The March 22, 2000 Decision informed plaintiff of this posture; it stated that the Director's decision to withdraw the patent from issue did not constitute either a rejection or an adverse action on the ultimate determination of unpatentability. See Pl.'s Mot. for Summ. J., Ex. 8. at 4. Plaintiff has remedies outside this suit and this Court. See May 22, 2000 Hr'g Tr. at 55-59. Those remedies undermine plaintiff's suggested interpretation of the statute. Any subsection (3) determination of unpatentability will necessarily represent only a possibility of unpatentability, since

such a determination, as defendant has made abundantly clear, is not in any way a final rejection. The PTO's withdrawal of plaintiff's patent application in order to reconsider its patentability was neither arbitrary nor capricious. [FN10]

FN10. This Court is troubled by several steps in the PTO's process, however. Defendant claims that the technology of the 294 application contravenes fundamental laws of chemistry and physics, yet the application was approved by a patent examiner, never reviewed by a supervisor, and would have issued as a patent but for the PTO's eleventh hour withdrawal. Defendant conceded at the May 22, 2000 hearing that the 294 application was withdrawn just days before the issuance date without the benefit of any PTO employee's re-evaluating the file. Also, the February 17 Notice, released twelve days before the scheduled issue date, gave no reason for the withdrawal besides a cryptic citation to 37 C.F.R. § 1.313(b)(3). At the May 22, 2000 hearing, defendant represented that these are common occurrences, because of the enormous number of patent applications that need to be addressed each year, and the "tremendous pressure" placed on patent examiners to produce work. See May 22, 2000 Hr'g Tr., at 48. Defendant may be welladvised to examine its patent issuance process so that their normal operations are not compromised by such seemingly suspicious procedures.

V. Conclusion

For the foregoing reasons, it is hereby

ORDERED that defendant's motion for summary judgment [13-1] is GRANTED; and it is

FURTHER ORDERED that plaintiff's motion for summary judgment [11-1] is DENIED; and it is

FURTHER ORDERED that the Clerk shall enter final judgment in favor of defendant and against plaintiff.

END OF DOCUMENT

Testing the Current

By Charles Platt

Sunday, June 25, 2000; X05

VOODOO SCIENCE The Road From Foolishness to Fraud By Robert L. Park Oxford Univ. 230 pp. \$25

For almost two decades, former physicist Robert Park has conducted a one-man search-and-destroy mission against inventors, scientists and pseudoscientists who make claims that he describes as "totally, indisputably, extravagantly wrong." As a Washington lobbyist and PR flack for the American Physical Society, Park is widely quoted whenever journalists need a rebuttal source who will scoff pithily at concepts such as magnetic healing or antigravity. He helped to establish a prestigious study panel that debunked Ronald Reagan's Star Wars Strategic Defense Initiative, and campaigned to discredit New Yorker journalist Paul Brodeur, who warned of possible health hazards caused by electromagnetic radiation from power lines. These and other battles are retold in Park's new book, Voodoo Science, which denounces the culprits he has most loved to hate over the years.

This book could have served a useful purpose. If public funds or private-investment capital really are being squandered by researchers who are self-deluded or even fraudulent, we need a thorough investigation. Alas, thoroughness is not Park's strong suit.

His primary source of information, quoted repeatedly in many of his rants, is the nightly TV news. Nothing seems to enrage him more than the sight of some upstart inventor getting air time for results that don't make sense; and Park's anger permeates his rebuttals, which border on character assassination. He contemptuously dismisses scientist James Patterson, for example, as a "caricature of an inventor" purely because of his physical appearance. There's no mention of his claim to fame as codeveloper of the fundamental laboratory technique of gas chromatography or his past consultancy work for Dow Chemical, Fairchild Semiconductor, Lockheed and the Atomic Energy Commission. Nor does Park allow Patterson any chance to explain or defend his work. In fact, none of the targets in Voodoo Science is allowed to speak for himself, apparently because Park chose not to talk to any of them.

This armchair journalism leads to some blunders. For instance, he mocks credentialed NASA scientists for investigating a gravity-shielding effect that he feels would violate a basic law of thermodynamics. If he had spoken to the researchers, they might have told him (as they told other journalists) why their theories entail no conflict with thermodynamics at all. Also, Park might have learned that the Russian emigre who prompted this work is not an obscure physicist (as he states) but a materials scientist claiming authorship of 30 papers and 10 patents.

Park's failure to gather first-hand data is unfortunate, but his selective omissions are far more serious. In at least one case, he violates basic principles of journalism and science itself by apparently suppressing information that conflicts with his foregone conclusion. He dismisses the phenomenon of nuclear fusion at low temperatures as "no closer to being proven than it was the day it was announced," despite hundreds of papers, including many from scientists affiliated with respected

universities, going far beyond the controversial claims that were made for "cold fusion" in 1989 Electrochemist Michael McKubre, at SRI International, confirms that he has submitted his papers to Park, who also attended a conference last year including presentations on this topic. Park chooses to mention none of this.

Such tactics are reminiscent of the behavior of a zealous DA who is so convinced that a suspect is guilty that he feels entitled to withhold some information from the jury. Since Park also "convicts" his suspects almost entirely by paraphrasing them in his own words, Voodoo Science is not the fair trial we might have hoped for.

This is unfortunate, because many of Park's targets have indeed made implausible claims, and may be guilty as charged. To be sure of this, however, we need a fairly argued refutation, not a perfunctory dismissal. The dividing line between valid data and artifacts is not always clear; the phenomenon of superconductivity, for instance, remained inexplicable for 42 years, as Park himself admits.

Despite Park's absolute faith in his own judgment, any rush to judgment entails a risk of convicting innocent people, while search-and-destroy missions may tend to cause collateral damage. This is a serious matter, since even poorly documented vitriol can jeopardize a scientist's reputation and future funding if it is disseminated with the complicity of a respected organization such as the American Physical Society.

Of course, so long as Park makes no mistakes, he may argue that his targets deserve their punishment. Still, his widely published attacks create a chilling effect that can discourage even legitimate scientists from discussing controversial work. This hardly seems consistent with the spirit of genuinely free inquiry that should energize science. Likewise, Park's reliance on second-hand data, his presentation of selective evidence and his refusal to quote his opponents are habits that seem unworthy of a scientist.

Charles Platt is a senior writer for Wired magazine.

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UNITED STATES DEPARTMENT OF COMMERCE
Patent and Trademark Office
ASSISTANT SECRETARY AND COMMISSIONER OF
PATENTS AND TRADEMARKS
Washington, D.C. 20231

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MAILED: FEB 1 2 2001

Paper No.:

In re Application of

Randall L. Mills

Serial No.'s: 09/009,837; 09/008,947;

09/009,294; 09/110,678; 09/111,003;

09/501,622, 09/110,694, 09/110,717;

09/225,687, and 09/362,693

COMMUNICATION

This communication is in response to your letter addressed to Ms. Esther Kepplinger, dated January 19, 2001. In your letter, you state that a personal interview on the above-identified applications has been scheduled for February 21, 2001, 10:00 a.m.

Examination procedures with respect to interview practice are set forth in MPEP 713.01. The purpose of an interview on the merits is to advance the prosecution of applications through clarification, discussion and possibly resolution of the legal and technical issues raised in an Office Action. Consequently, I have arranged for the Primary Examiners and Supervisors who were directly involved in the creation of the Office actions in the pending applications, to be present at the interview. These individuals are Wayne Langel, Vasu Jagannathan, and Steve Griffin.

Issues raised in your letter which are not germane to the advancement of prosecution on the pending applications are outside the scope of an interview, and will not be addressed during that time.

It is our hope that the interview on the merits will constitute a beneficial discussion of the legal and technical positions set forth by the examiners.

Sincerely,

Jacqueline M. Stone, Director

Director, Technology Center 1700

Chemical and Materials Engineering

RON WYDEN OREGON

516 Hart Senere Building Washington, DC 20510-3703 1202) 224-5244

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mean side:



WASHINGTON, DC 20510-3703



April 5, 2000

The Honorable Q. Todd Dickinson Commissioner of Patents and Trademarks U.S. Department of Commerce Washington, D.C. 20231

Re: Blacklight Power, Inc.'s Patent Application Ser. No.

09/009,294

Dear Commissioner Dickinson:

I am writing this letter on behalf of one of my constituents who is a member of the Board of Directors of Blacklight Power, Inc. It has come to my attention that the U.S. Patent & Trademark Office has withdrawn a Blacklight patent application, Ser. No. 09/009,294 ("294 application"), which was due to issue as U.S. Patent No. 6,030,601 on February 29, 2000. A copy of the February 17, 2000 Notice of withdrawal that was sent to Blacklight's counsel is attached. It is alleged by my constituent that the patent due to issue to Blacklight was withdrawn through an unusual process.

Please also find enclosed a copy of an abstract for a speech from an Official at the U.S. Department of State, Dr. Peter Zimmerman, who plans to present a paper to the American Physics Society in April. The abstract states that Dr. Zimmerman's "own Department and the Patent Office have fought back with success" against inventors of "hydrinos." According to Blacklight Power, the term "hydrinos" was coined and is used exclusively by the company.

My questions concerning this matter relate to: (1) any involvement you may have had in pulling the '294 application from issuance; (2) any exparte communications that may have occurred between third parties and the Patent Office relating to Blacklight or its technology; and (3) how the State Department and the Patent Office may have "fought back with success" against Blacklight.

Committees

Budget Commerce, Science & Transportation Energy & Natural Resources Environment & Public Works Special Committee on Aging

Oregest State Offices

700 NE Multnoman St Suite 450 Portland, OR 57232 1503) 326–7525

IS1 West 7th Ave Suite 435 Eugene, OR 97401 (541) 431-0229

See Annex Building 105 Fir St Suite 218 La Grande, OR 97850 (541) 962-7691

U.S. Courthouse 310 West 6th St Room 118 Medford, OR 97501 (541) 858-\$122

The Jamison Building 131 NW Hawithorne Ave Suite 107 Bend, OR 97701 (541) 330-9142

707 13th St, SE Suite 285 Selem, OR 97301 (503) 585-4555

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To address these concerns, I am requesting that you provide me with the following information:

- (a) A written description of your role and any relevant communications between you and other Patent Office personnel in withdrawing the '294 application from issue.
- (b) Copies of any written communications between third parties and the Patent Office relating to Blacklight or its technology, including any correspondence between you or other Patent Office personnel and the State Department, including Dr. Zimmerman; and any written communications between the Patent Office and any other Federal agencies relating to Blacklight or its technology.
- (c) The extent of any cooperation between Dr. Zimmerman, the U.S. State Department, and the Patent Office relating to Blacklight, its technology or the '294 application.

I look forward to your prompt response to this request. If you have any questions concerning this request, please contact Joshua Sheinkman of my staff at (202) 224-5244.

Sincerely,

Ron Wyden

United States Senator

Attachments: February 17, 2000 Notice of withdrawal Peter D. Zimmerman, "Touching the Third Rail: Encounters with Pseudoscience and Pseudoscientists," U.S. Department of State

CC: Kevin Baer, Esq., Attorney-Advisor, U.S. Patent Office Janie Cooksey, U.S. Department of Commerce Mr. C. Norman Winningstad



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Paper No.

FARKAS & MANBLLI, PLLC 2000 M STREET NW 7TH FLOOR WASHINGTON, DC 20036-3307

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FEB 17 2000

SPECIAL PROGRAMS OFFICE DAC FOR PATERTS

MOTICE

In re Application of Rendell L. Mills Application No. 09/009,294 Filed: January 20, 1998 Attorney Docket No. 911319

The purpose of this communication is to inform you that the instant application, which has received Patent No. 6,030,601 and an issue date of Pebruary 29, 2000, is being withdrawn from issue pursuant to 37 CPR 1.313.

The application is being withdrawn to permit reopening of prosecution. This withdrawal was requested by the Director, Special Program Law Office.

The issue fee is refundable upon written request. However, if the application is again found allowable, the issue fee can be applied toward payment of the issue fee in the amount identified on the new Notice of Allowance and Issue Fee Due upon written request. This request and any balance due must be received on or before the due date noted in the new Notice of Allowance in order to prevent abandonment of the application.

This application, upon receipt in the Office of Petitions, will be forwarded to Technology Center AU 1745 for reopening of prosecution.

Telephone inquiries concerning this matter may be directed to the undersigned at (703) 305-8680.

Frances Hicks

Petitions Braminer
Office of Petitions
Office of the Deputy Assistant Commissioner
for Patent Policy and Projects



Previous abstract | Graphical version | Text version | Next abstract

Session J12 - FPS Awards Session-Business Meeting.
MIXED session, Sunday afternoon, April 30
101B, Long Beach Convention Center

[J12.001] Touching the Third Rail: Encounters with Pseudoscience and Pseudoscientists

Peter D. Zimmerman (United States Department of State, Washington, DC 20520)

Pseudoscience, and particularly "pseudophysics" is alive and thriving as we approach the turn of the millennium. Not only have many "inventors" of cold fusion spin-offs been making money from investors, but they and "inventors" of various kinds of "zero point energy" devices, perpetual motion machines, and other wonders such as "hydrinos" have found friends in the United States Senate. At least one Nobel Laureate in physics has come to their aid. The Web has been a powerful organizing force as well.

Some organizations, including my own Department and the Patent Office have fought back with success, but always at great cost in time and energy. Pseudophysicists and their friends have money, influence, and sometimes clout. They have not hesitated to use threats, personal attacks, and the full machinery by which government is made accountable to the public to strike at those who expose technical fraud. Encounters with pseudophysicists are like grabbing a hot wire: after the first contact it is hard to get free, and it can inflict serious injury. But you, and I, and all our colleagues in the APS must do what we can to ensure that U.S. policy is not manipulated by pseudoscience, to make certain that taxpayer money is not wasted on nonesense, and to restore public confidence in real science. This will take efforts at public education, work, and as I have learned in the last year not a little bit of courage. APS and FPS should be in the thick of the battle. This talk is an account of a year in the fray.

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DERT G. TORRICELLI MEN JERSEY

COMMUTTEES

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113 DIRKSEN SENATE OFFICE BUILDING WASHINGTON, DC 20510-3003 [202] 224-3224

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Nicholas P. Godici
Acting Undersecretary of Commerce for Intellectual Property
and Acting Director of the Patent and Trademark Office
U.S. Patent and Trademark Office
Washington, D.C. 20231

Dear Acting Director Godici:

I am writing you on behalf of Blacklight Power, Inc., one of my constituent companies. Recently, I received the attached letter from Blacklight detailing what seem to be very unusual circumstances that have arisen in the course of their attempts to obtain a patent for their new and intriguing technology. In my opinion, if the allegations set forth in this letter are indeed true, they raise troubling questions about the conduct of some representatives of the Patent Office.

I ask that you look into this matter and I look forward to receiving your response to the issues raised in the attached correspondence. Thank you for your consideration and your attention to this matter.

Sincerely.

Robert G. Torricelli

UNITED STATES SENATOR



7288703.6

493 Old Trenton Road Cranbury, NJ 08512

Telephone Fax (609) 490-1090 (609) 490-1066

May 10, 2001

The Honorable Robert G. Torricelli, U.S. Scnator 113 Dirksen Senate Office Building Washington, DC 20510

Re: Investigation of Improper Actions by U.S. Patent Office

Dear Senator Torricelli:

We kindly request your assistance in investigating and addressing the highly improper actions taken by the U.S. Patent and Trademark Office (PTO) against a constituent of yours, BlackLight Power, Inc. (BlackLight). These actions not only threaten the livelihood of a thriving New Jersey company, but threaten to undermine the integrity of the U.S. patent system, as well as diminish our ability to effectively cope with the looming energy crisis in this country.

BlackLight is a small start-up company located in Cranbury, New Jersey. It employs 35 individuals, most of whom are research scientists, engineers, and technicians. For the past three years since BlackLight located its operations in New Jersey, BlackLight has worked tirelessly and has spent millions of dollars developing a new, commercially feasible, clean process for producing electricity from hydrogen. BlackLight's technology represents a significant advance in the field of energy production and the company has built a substantial business and scientific team to commercialize products. This technology is based on Dr. Randell L. Mills' theory and experimentally verified process of utilizing catalysts to relax the electron in hydrogen atoms to lower energy levels to thereby release clean energy and produce novel chemical products. Rest assured that our technology is not based on "cold fusion" or other speculative technologies.

Blacklight's new energy production process and novel chemical products are easily reproducible and have been independently verified by prestigious universities, government agencies and laboratories. Early generation power cells were confirmed by MIT Lincoln Labs, INEL, Westinghouse Corporation, NASA Lewis, Chalk River National Laboratory, Thermacore Corporation, and Pennsylvania State University. The chemical products were predicted and analyzed by 20 different types of tests performed at over 20 independent laboratories. BlackLight recently submitted 22 journal articles to journals, 16 of which are presently in press or published, which broadly disclose the test results for general peer review. The articles overwhelmingly verify BlackLight's novel hydrogen chemistry by reporting data from extreme ultraviolet (EUV) spectroscopy, plasma formation, power generation, and analysis of chemical products. BlackLight has also made 22 presentations of its results at scientific meetings over the past two years. The most recent presentation at the National Hydrogen Association, 12th Annual U.S. Hydrogen Meeting and Exposition, resulted in an invitation to submit an article to the published meeting proceedings.

The Honorable Robert G. Torricelli May 10, 2001 Page 2 of 5

Because the theory involved is revolutionary and questions the validity of basic assumptions that underlie established Quantum Mechanics, Dr. Mills' work is highly controversial. And, as always is the case in "paradigm shifting' events, both Dr. Mills and his theory have been the subjects of criticism—and even derision—by a number of established and respected sources that have acknowledged their failure to even study BlackLights' published experimental results.

The promise inherent in the ultimate commercial application of BlackLight's theory to this nation and, indeed, to all mankind is truly staggering. It represents the potential capability for mankind to harness an unlimited source of energy with vastly lower environmental impacts from harmful waste product emissions or, as with nuclear energy systems, radioactive material disposition. With the advent of this nation's ever- increasing dependency on energy from politically unstable sources overseas, rapidly escalating fuel prices, and now the prospect of rolling blackouts, such as those already occurring in California, the need for alternative low-cost, abundant sources of energy in this country has never been greater.

As an initial step in bringing its energy technology to market, BlackLight sought to protect its intellectual property rights in that technology by filing numerous patent applications in the PTO. Unfortunately, the PTO has mishandled these applications and, in so doing, has failed to carry out its Constitutional mandate to advance the progress of science.

Specifically, evidence has been uncovered regarding the PTO's improper use of outside contacts, including officials from the State Department and the American Physical Society (APS) in what appears to be a concerted effort to subvert BlackLight's technology. For instance, there is strong evidence showing that PTO officials received unidentified ex parte communications from competitors of BlackLight that resulted in the PTO Commissioner withdrawing from issue several BlackLight applications that had been previously allowed. [Attachment 5, February 28, 2000 and Attachment 6, January 19, 2001 letters to Director Esther Kepplinger of the PTO] Indeed, Dr. Peter Zimmerman, former Chief Scientist at the State Department, has admitted that Dr. Robert Park—spokesperson for the APS, a BlackLight competitor—uses a contact in the PTO that Dr. Park refers to as "Deep Throat" to obtain confidential information, including information relating to BlackLight's previously allowed patent applications. Following withdrawal of BlackLight's patent applications from issue, an abstract written by Dr. Zimmerman appeared on the APS' website boasting that the PTO and State Department had "fought back with success" against BlackLight. [See copy of Abstract in Attachment 6, Tab C of January 19, 2001 letter to Director Kepplinger]

Although the APS' "Deep Throat" contact has been brought to the PTO's attention on several occasions, so far, PTO officials have refused to cooperate in providing any information relating to this subject. Inasmuch as U.S. patent applications are to be held in strict confidence, obviously, any breach of that confidentiality would be deeply troubling, but particularly so if

The Honorable Robert G. Torricelli May 10, 2001 Page 3 of 5

information was being disseminated to one of BlackLight's competitors. [See copy of July 10, 2000 Letter to State Department in Attachment 6, Tab C of January 19, 2001 letter to Director Kepplinger]

The PTO has also taken extreme positions, perhaps in concert with outside competitive forces, to thwart the granting of BlackLight's patents. These actions include muzzling and essentially replacing the Examiners who had previously allowed BlackLight's patent applications with a "Secret Committee" of PTO officials assigned the task of rejecting those applications behind "closed doors." To this day, Examiner Langel, who has 28 years of experience in prosecuting patent applications, believes BlackLight's energy patent applications represent significant technological advances and therefore are allowable. Recent discussions with Examiner Langel confirm that, while he believes the experimental evidence supporting allowance of the applications submitted by BlackLight is overwhelming, he is being instructed by the Secret Committee to reject the applications despite the lack of adequate basis to do so.

Attempts by BlackLight to learn the full composition of the PTO's "Secret Committee," including the identity of outside consultants and/or competitors who may have served illegally as committee members in further breach of PTO confidentiality, have been met with only antagonism and outright aggression. Such hostility toward patent applicants is, to our knowledge, unprecedented and in clear violation of fundamental principles of due process that can only crode the trust and confidence that the public places in the PTO.

Although BlackLight has satisfied, indeed exceeded, the statutory requirements of patentability for its novel energy technology, BlackLight's counsel and company executives met with PTO officials at an interview conducted at the PTO on February 21, 2001 in an attempt to resolve this matter. Specifically, BlackLight attempted to discern through this interview the newly-minted patent standards that were being used to thwart BlackLight's applications, as well as the composition of the Secret Committee and outside consultants that were assembled to lead the PTO's attack against BlackLight.

PTO officials attending the interview flatly refused to even discuss BlackLight's request seeking the complete identity of the PTO's Secret Committee members. Indeed, Secret Committee Examiner Jagannathan, who led the interview on behalf of the PTO, became quite indignant in his response to BlackLight's inquiry, claiming that this information was not germane to the prosecution and, in a harsh tone, threatened to shut down the interview if BlackLight further inquired into the matter. Ironically, without an initial investigation conducted by BlackLight's counsel, the identity of Secret Committee Examiner Jagannathan and his own involvement in subverting BlackLight's patent applications would never have become known and he would not have been forced to attend the interview. Unfortunately, his appearance at the interview was used as yet another opportunity to "stonewall" BlackLight's attempt to obtain answers to legitimate questions. [Attachment 1, PTO mailing dated February 12, 2001 identifying certain members of Secret Committee]

The Honorable Robert G. Torricelli May 10, 2001 Page 4 of 5

The PTO also made clear during the interview that it did not feel constrained to follow established statutory standards of patentability—standards that BlackLight had already met in obtaining allowance upon the first complete examination—and that it was free to create new, more oncrous standards of patentability that apply only to BlackLight. The PTO absolutely refused to provide any guidance as to the level of experimental evidence that would be required to once again convince the PTO to allow BlackLight's patent applications and even went so far as to require that BlackLight's experimental evidence be published and evaluated by its competitors before it could be considered. Surely, when enacting the patent statutes, Congress never intended that applicants' competitors oversee the granting of U.S. patents.

Unfortunately, prior attempts to investigate this matter by Senator Max Cleland have been similarly thwarted. Twice now, Senator Cleland has requested relevant information from the PTO and, in both instances, the PTO has refused to honor his request. [Attachment 2]

The first excuse the PTO gave for its refusal was that the matter was the subject of litigation between the PTO and BlackLight over the withdrawal of the allowed patent applications from issuance, presently pending before the Court of Appeals for the Federal Circuit. That excuse, however, is simply untrue since the parties stipulated in the litigation that any unidentified ex parte communications the PTO may have received from third parties resulting in the withdrawal of BlackLight's patent applications are not germane to whether the withdrawal itself was legal. Incredibly, the PTO has further argued that the present prosecution of BlackLight's patent applications is a proceeding separate and distinct from the litigation over the legality of withdrawing those applications from issue. And yet, when pressed a second time to provide information relating to the persons involved in the present prosecution of the subject applications, the PTO had the audacity to claim that such information was still not germane. [Attachment 3, Interview Summary] Please be assured that the limited information BlackLight seeks regarding the PTO's improper actions is not the subject of any litigation and, thus, the PTO's refusal to provide that information will not be resolved by any pending court proceeding.

Other attempts to extract this information from the PTO through official government channels have also failed. For instance, BlackLight sought to have Secretary of Commerce Donald Evans conduct an inquiry into this matter since his Department has direct jurisdiction over the administration of the PTO. Secretary Evans' office, however, declined to intervene believing that there were "no compelling reasons" to do so and merely referred the matter back to the PTO. [Attachment 4, February 14, 2001 letter from Nicholas P. Godici, Acting Under Secretary of Commerce for Intellectual Property]

The PTO's continued avoidance in dealing with this inquiry is simply unacceptable and so we are now turning to you for help. The commercial deployment of BlackLight's technology in the U.S. stands to significantly impact our country's energy policies in a very positive way and, in the process, bring notoriety to the State of New Jersey. The fair administration of the

The Honorable Robert G. Torricelli May 10, 2001 Page 5 of 5

patent examination process, which hopefully will once again lead to the granting of patents on that technology, is an important step in that direction. Critical not just to BlackLight, but to all patent applicants, is knowing that the PTO is conducting itself with the utmost integrity and candor in the examination process. One way to assure ourselves of maintaining this worthy objective would be, with your help, to initiate an investigation into the PTO's improper actions by the General Accounting Office.

Any suggestions as to other actions we might take or other assistance you can provide in resolving this unfortunate situation would be greatly appreciated. Should you require any additional information regarding this matter, please scel free to contact my counsel, Jeffrey S. Melcher (202.261.1045) or Jeffrey A. Simenauer (202.261.1001), with any questions you may have.

In addition, in view of the potential importance of BlackLight's research to the United States and its close proximity to your New Jersey offices, we would be honored if you and certain of your staff would visit the company's facility in Cranbury for a personal briefing and tour of the laboratories, and witness for yourself the performance of our demonstration devices.

Thank you for your consideration of this important matter.

Sincerely yours,

Dr. Randell L. Mills

President, BlackLight Power, Inc.

Attachments

Administrator for External Affairs Washington, DC 20231 www.uspto.gov

The Honorable Robert G. Torricolli United States Senate Washington, D.C. 20510-3003

AUG 1 4 2001

Dear Senator Torricelli:

Thank you for your letter on behalf of Dr. Randell L. Mills, President, Blacklight Power, Inc., regarding patent application serial number 09/009,294, and the circumstances concerning its withdrawal from issuance by the United States Patent and Trademark Office (USPTO).

Dr. Mills expresses concerns of "improper" acts by the USPTO, including the possibility of inappropriate communications with outside parties, with particular regard to the withdrawal of that application from allowance. In doing so, he offers a number of allogations to support his concerns.

However, the withdrawal from issue of patent application serial number 09/009,294 is the subject of litigation in the case of Blacklight Power, Inc. v. Dickinson, Civ. No. 00-0422 (D.D.C.). The case is currently on appeal to the Court of Appeals of the Federal Circuit from final judgment entered in favor of the USPTO on August 15, 2000, in the district court. Although Dr. Mills states that he does not consider the information requested regarding outside contacts, among other items, to be the subject of the litigation, it is our view that these issues were raised in the ongoing litigation. It would be inappropriate, therefore, to comment on this matter in detail. Furthermore, the application is still pending and the applicant possesses all procedural remedies, including, but not limited to, the opportunity to seek judicial relief.

In light of the pending status of the relevant litigation, any additional comment by the USPTO would be inappropriate.

We trust the foregoing will be useful in responding to your constituent. For your information, a similar letter of response about this matter is also being sent to Senator Jon S. Corzine.

Sincerely,

Robert L. Stoll

Administrator for External Affairs

ON S. CORZINE

COMMITTES.
INKING, HOUSING, AND URBAN AFFAIRS
ENVIRONMENT AND PUBLIC WORKS
JOINT ECONOMIC

United States Senate

WASHINGTON, DC 20510-3004

502 SENATE HAAT OFFICE BUILDING WASHINGTON, DC 23510 1202) 224-4744

ONE GATEWAY CENTER
11 IN FLOOR
NEWARE, NJ 07107
19731 645-3030

208 WHITE HORSE PRE SUITE 18-19 BARRHGTON, NJ 08007 1956) 757-5353

August 2, 2001

The Honorable Q. Todd Dickinson United States Department of Commerce Patent and Trademark Office Washington, D.C. 20231

> Re: Blacklight Power, Inc.'s Patent Application Serial# 09/009,294

Dear Commisioner:

Enclosed is correspondence I received in reference to a matter involving your agency. This is a matter of particular interest to me and I would appreciate your fair and appropriate consideration.

In your reply, please reference Blacklight Power, Inc.

If you need further information, please contact Debbie Curto, Director of Constituent Services, at (973) 645.3502.

Again, thank you for your assistance.

Jan C Carina

Sincerely

United States Senator

JSC:dpc

Enclosure

May 10, 2001

The Honorable Robert G. Torricelli, U.S. Senator 115 Dirksen Senate Building Washington, DC. 20510

Re: Investigation of Improper Actions by U.S. Patent Office

Dear Senator Torricelli:

We kindly request your assistance in investigating and addressing the highly improper actions taken by the U.S. Patent and Trademark Office (PTO) against a constituent of yours, BlackLight Power, Inc. (BlackLight). These actions not only threaten the livelihood of a thriving New Jersey company, but threaten to undermine the integrity of the U.S. patent system, as well as diminish our ability to effectively cope with the looming energy crisis in this country.

BlackLight is a small start-up company located in Cranbury, New Jersey. It employs 35 individuals, most of whom are research scientists, engineers, and technicians. For the past three years since BlackLight located its operations in New Jersey, BlackLight has worked tirelessly and has spent millions of dollars developing a new, commercially feasible, clean process for producing electricity from hydrogen. BlackLight's technology represents a significant advance in the field of energy production and the company has built a substantial business and scientific team to commercialize products. This technology is based on Dr. Randell L. Mills' theory and experimentally verified process of utilizing catalysts to relax the electron in hydrogen atoms to lower energy levels to thereby release clean energy and produce novel chemical products. Rest assured that our technology is not based on "cold fusion" or other speculative technologies.

Blacklight's new energy production process and novel chemical products are easily reproducible and have been independently verified by prestigious universities, government agencies and laboratories. Early generation power cells were confirmed by MIT Lincoln Labs, INEL, Westinghouse Corporation, NASA Lewis, Chalk River National Laboratory, Thermacore Corporation, and Pennsylvania State University. The chemical products were predicted and analyzed by 20 different types of tests performed at over 20 independent laboratories. BlackLight recently submitted 22 journal articles to journals, 16 of which are presently in press or published, which broadly disclose the test results for general peer review. The articles overwhelmingly verify BlackLight's novel hydrogen chemistry by reporting data from extreme ultraviolet (EUV) spectroscopy, plasma formation, power generation, and analysis of chemical products. BlackLight has also made 22 presentations of its results at scientific meetings over the past two years.

The Honorable Robert G. Torricelli May 10, 2001 Page 2 of 5

The most recent presentation at the National Hydrogen Association, 12th Annual U.S. Hydrogen Meeting and Exposition, resulted in an invitation to submit an article to the published meeting proceedings.

Because the theory involved is revolutionary and questions the validity of basic assumptions that underlie established Quantum Mechanics, Dr. Mills' work is highly controversial. And, as always is the case in "paradigm shifting" events, both Dr. Mills and his theory have been the subjects of criticism—and even derision—by a number of established and respected sources that have acknowledged their failure to even study BlackLights' published experimental results.

The promise inherent in the ultimate commercial application of BlackLight's theory to this nation and, indeed, to all mankind is truly staggering. It represents the potential capability for mankind to harness an unlimited source of energy with vastly lower environmental impacts from harmful waste product emissions or, as with nuclear energy systems, radioactive material disposition. With the advent of this nation's ever-increasing dependency on energy from politically unstable sources overseas, rapidly escalating fuel prices, and now the prospect of rolling blackouts, such as those already occurring in California, the need for alternative low-cost, abundant sources of energy in this country has never been greater.

As an initial step in bringing its energy technology to market, BlackLight sought to protect its intellectual property rights in that technology by filing numerous patent applications in the PTO. Unfortunately, the PTO has mishandled these applications and, in so doing, has failed to carry out its Constitutional mandate to advance the progress of science.

Specifically, evidence has been uncovered regarding the PTO's improper use of outside contacts, including officials from the State Department and the American Physical Society (APS) in what appears to be a concerted effort to subvert BlackLight's technology. For instance, there is strong evidence showing that PTO officials received unidentified ex parte communications from competitors of BlackLight that resulted in the PTO Commissioner withdrawing from issue several BlackLight applications that had been previously allowed. [Attachment 5, February 28, 2000 and Attachment 6, January 19, 2001 letters to Director Esther Kepplinger of the PTO] Indeed, Dr. Peter Zimmerman, former Chief Scientist at the State Department, has admitted that Dr. Robert Park—spokesperson for the APS, a BlackLight competitor—uses a contact in the PTO that Dr. Park refers to as "Deep Throat" to obtain confidential information, including information relating to BlackLight's previously allowed patent applications. Following withdrawal of BlackLight's patent applications from issue, an abstract written by Dr. Zimmerman appeared on the APS' website boasting that the PTO and State Department had "fought back with success" against BlackLight. [See copy of Abstract

The Honorable Robert G. Torricelli May 10, 2001 Page 3 of 5

in Attachment 6, Tab C of January 19, 2001 letter to Director Kepplinger].

Although the APS' "Deep Throat" contact has been brought to the PTO's attention on several occasions, so far, PTO officials have refused to cooperate in providing any information relating to this subject. Inasmuch as U.S. patent applications are to be held in strict confidence, obviously, any breach of that confidentiality would be deeply troubling, but particularly so if information was being disseminated to one of BlackLight's competitors. [See copy of July 10, 2000 Letter to State Department in Attachment 6, Tab C of January 19, 2001 letter to Director Kepplinger]

The PTO has also taken extreme positions, perhaps in concert with outside competitive forces, to thwart the granting of BlackLight's patents. These actions include muzzling and essentially replacing the Examiners who had previously allowed BlackLight's patent applications with a "Secret Committee" of PTO officials assigned the task of rejecting those applications behind "closed doors." To this day, Examiner Langel, who has 28 years of experience in prosecuting patent applications, believes BlackLight's energy patent applications represent significant technological advances and therefore are allowable. Recent discussions with Examiner Langel confirm that, while he believes the experimental evidence supporting allowance of the applications submitted by BlackLight is overwhelming, he is being instructed by the Secret Committee to reject the applications despite the lack of adequate basis to do so.

Attempts by BlackLight to learn the full composition of the PTO's "Secret Committee," including the identity of outside consultants and/or competitors who may have served illegally as committee members in further breach of PTO confidentiality, have been met with only antagonism and outright aggression. Such hostility toward patent applicants is, to our knowledge, unprecedented and in clear violation of fundamental principles of due process that can only erode the trust and confidence that the public places in the PTO.

Although BlackLight has satisfied, indeed exceeded, the statutory requirements of patentability for its novel energy technology, BlackLight's counsel and company executives met with PTO officials at an interview conducted at the PTO on February 21, 2001 in an attempt to resolve this matter. Specifically, BlackLight attempted to discern through this interview the newly-minted patent standards that were being used to thwart BlackLight's applications, as well as the composition of the Secret Committee and outside consultants that were assembled to lead the PTO's attack against BlackLight.

PTO officials attending the interview flatly refused to even discuss BlackLight's request seeking the complete identity of the PTO's Secret Committee members. Indeed, Secret Committee Examiner Jagannathan, who led the interview on behalf of the PTO, became quite indignant in his response to BlackLight's inquiry, claiming that

The Honorable Robert G. Torricelli May 10, 2001 Page 4 of 5

this information was not germane to the prosecution and, in a harsh tone, threatened to shut down the interview if BlackLight further inquired into the matter. Ironically, without an initial investigation conducted by BlackLight's counsel, the identity of Secret Committee Examiner Jagannathan and his own involvement in subverting BlackLight's patent applications would never have become known and he would not have been forced to attend the interview. Unfortunately, his appearance at the interview was used as yet another opportunity to "stonewall" BlackLight's attempt to obtain answers to legitimate questions. [Attachment 1, PTO mailing dated February 12, 2001 identifying certain members of Secret Committee]

The PTO also made clear during the interview that it did not feel constrained to follow established statutory standards of patentability—standards that BlackLight had already met in obtaining allowance upon the first complete examination—and that it was free to create new, more onerous standards of patentability that apply only to BlackLight. The PTO absolutely refused to provide any guidance as to the level of experimental evidence that would be required to once again convince the PTO to allow BlackLight's patent applications and even went so far as to require that BlackLight's experimental evidence be published and evaluated by its competitors before it could be considered. Surely, when enacting the patent statutes, Congress never intended that applicants' competitors oversee the granting of U.S. patents.

Unfortunately, prior attempts to investigate this matter by Senator Max Cleland have been similarly thwarted. Twice now, Senator Cleland has requested relevant information from the PTO and, in both instances, the PTO has refused to honor his request. [Attachment 2]

The first excuse the PTO gave for its refusal was that the matter was the subject of litigation between the PTO and BlackLight over the withdrawal of the allowed patent applications from issuance, presently pending before the Court of Appeals for the Federal Circuit. That excuse, however, is simply untrue since the parties stipulated in the litigation that any unidentified ex parte communications the PTO may have received from third parties resulting in the withdrawal of BlackLight's patent applications are not germane to whether the withdrawal itself was legal. Incredibly, the PTO has further argued that the present prosecution of BlackLight's patent applications is a proceeding separate and distinct from the litigation over the legality of withdrawing those applications from issue. And yet, when pressed a second time to provide information relating to the persons involved in the present prosecution of the subject applications, the PTO had the audacity to claim that such information was still not germane. [Attachment 3, Interview Summary] Please be assured that the limited information BlackLight seeks regarding the PTO's improper actions is not the subject of any litigation and, thus, the PTO's refusal to provide that information will not be resolved by any pending court proceeding.

The Honorable Robert G. Torricelli May 10, 2001 Page 5 of 5

Other attempts to extract this information from the PTO through official government channels have also failed. For instance, BlackLight sought to have Secretary of Commerce Donald Evans conduct an inquiry into this matter since his Department has direct jurisdiction over the administration of the PTO. Secretary Evans' office, however, declined to intervene believing that there were "no compelling reasons" to do so and merely referred the matter back to the PTO. [Attachment 4, February 14, 2001 letter from Nicholas P. Godici, Acting Under Secretary of Commerce for Intellectual Property]

The PTO's continued avoidance in dealing with this inquiry is simply unacceptable and so we are now turning to you for help. The commercial deployment of BlackLight's technology in the U.S. stands to significantly impact our country's energy policies in a very positive way and, in the process, bring notonety to the State of New Jersey. The fair administration of the patent examination process, which hopefully will once again lead to the granting of patents on that technology, is an important step in that direction. Critical not just to BlackLight, but to all patent applicants, is knowing that the PTO is conducting itself with the utmost integrity and candor in the examination process. One way to assure ourselves of maintaining this worthy objective would be, with your help, to initiate an investigation into the PTO's improper actions by the General Accounting Office.

Any suggestions as to other actions we might take or other assistance you can provide in resolving this unfortunate situation would be greatly appreciated. Should you require any additional information regarding this matter, please feel free to contact my counsel, Jeffrey S. Melcher (202.261.1045) or Jeffrey A. Simenauer (202.261.1001), with any questions you may have.

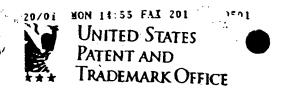
In addition, in view of the potential importance of BlackLight's research to the United States and its close proximity to your New Jersey offices, we would be honored if you and certain of your staff would visit the company's facility in Cranbury for a personal briefing and tour of the laboratories, and witness for yourself the performance of our demonstration devices.

Thank you for your consideration of this important matter.

Sincerely yours,

Dr. Randell L. Mills President, BlackLight Power, Inc.

Attachments



Administrator for External Affairs Washington, DC 20231 www.uspto.gov

The Honorable Jon S. Corzine United States Senate One Gateway Center, 11th Floor Newark, NJ 07102

AUG 1 4 2001

Attention: Debbie Curto

Dear Senator Corzine:

Thank you for your letter on behalf of Jeffrey S. Melcher, and his client, Dr. Randell L. Mills, President, Blacklight Power, Inc., regarding patent application serial number 09/009,294, and the circumstances concerning its withdrawal from issuance by the United States Patent and Trademark Office (USPTO).

Dr. Mills expresses concerns of "improper" acts by the USPTO, including the possibility of inappropriate communications with outside parties, with particular regard to the withdrawal of that application from allowance. In doing so, he offers a number of allegations to support his concerns.

However, the withdrawal from issue of patent application serial number 09/009,294 is the subject of litigation in the case of Blacklight Power, Inc. v. Dickinson, Civ. No. 00-0422 (D.D.C.). The case is currently on appeal to the Court of Appeals of the Federal Circuit from final judgment entered in favor of the USPTO on August 15, 2000, in the district court. Although Dr. Mills states that he does not consider the information requested regarding outside contacts, among other items, to be the subject of the litigation, it is our view that these issues were raised in the ongoing litigation. It would be inappropriate, therefore, to comment on this matter in detail. Furthermore, the application is still pending and the applicant possesses all procedural remedies, including, but not limited to, the opportunity to seek judicial relief.

In light of the pending status of the relevant litigation, any additional comment by the USPTO would be inappropriate.

We trust the foregoing will be useful in responding to your constituent. For your information, a similar letter of response about this matter is also being sent to Senator Robert G. Torricelli.

Sincerely,

Robert L. Stoll

Administrator for External Affairs

GEORGIA

THEODORY: 17021 724-3521

TOD/TTY 17021 724-1203

United States Senate

COMMITTES, annen senves summence sources summence services summers and arrains summers summers

WASHINGTON, DC 20510-1005

March 24, 2000

Ms. Janie Cooksey Congressional Liaison U.S. Department of Commerce Patent and Trademark Office Washington, DC 20231

Dear Ms. Cooksey:

The information enclosed is of the utmost importance to my constituent, Mr. Eric Jansson. The information provided raises significant questions about the procedures followed by the Patent and Trademark Office in the decision to withhold issuance of several patents.

I understand, from speaking to the representative of my constituent, that the decision to withhold issuance of these patents was made in a most unconventional fashion. I would very deeply appreciate a thorough review of this situation and a complete report on the basis for the decision which was made in this case.

As you will note, my constituent has a firm belief that the technology involved in this application has a very great commercial as well as social value. I would be grateful for all that you can do to assure that this matter is promptly addressed.

Thank you for your consideration.

Most respectfully,

Max Cleland

United States Senator

MC:jhs



UNITED STATES DEPARTMENT OF COMMERCE Patent and Trademark Office
ASSISTANT SECRETARY AND COMMISSIONER
OF PATENTS AND TRADEMARKS
Washington, O.C. 20231

APR 2 1 2000

The Honorable Max Cleland United States Senate Washington, D.C. 20510-1005

Dear Senator Cleland:

Thank you for your recent letter concerning your constituent Eric Jansson.

The matter to which Mr. Jansson refers is currently in litigation in the case of Blacklight Power, Inc. v. Dickinson, Civ. No. 00-0422 (D.D.C.). It would be inappropriate, therefore, to comment in detail. Moreover, the application is still pending and the applicant possesses all procedural remedies, including, but not limited to, the opportunity to seek judicial relief.

The United States Patent and Trademark Office (USPTO) has moved for summary judgment in that litigation. Attached is a copy of the USPTO's Opposition to Plaintiff's Motion for Summary Judgment, including affidavits, recently filed in the litigation that addresses and denies the applicant's allegations concerning improper handling of the application.

I appreciate your letter and believe that the federal district court will fairly adjudicate the pending matter.

Sincerely,

Robert L. Stoll

Administrator for External Affairs

Enclosure

MAY 15 2000

The Honorable Max Cleland United States Senate Washington, D.C. 20510-1005

Dear Senator Cleland:

Thank you for your most recent letter on behalf of a constituent, Eric Jansson, regarding on-going litigation between the United States Patent and Trademark Office (USPTO) and Blacklight Power, Inc.

Your letter indicates that your constituent is an investor in Blacklight Power. In the litigation, Blacklight Power is represented by counsel. Thus, it would be inappropriate for the USPTO to communicate directly, or indirectly through your office, with a person represented by counsel. Moreover, any discovery in this matter should be conducted by counsel under the district court's supervision and procedures. Last, Blacklight Power is also represented by counsel before the USPTO in regards to its patent application. When counsel has appeared to represent the patent applicant, the USPTO does not conduct the patent application process with multiple parties nor with persons having some fractional interest in the patent application.

We appreciate your understanding of the nature of your request and your intention not to urge disclosure that would be inappropriate. The district court has scheduled a hearing on May 16, 2000, to hear arguments on the cross-motions for summary judgment. Given the pending litigation, issues concerning this application are best left for resolution by the parties counsel and the district court.

Sincerely,

Robert L. Stoll

Administrator for External Affairs

Jet Stu

United States Senate

WASHINGTON, DC 20510

December 20, 2001

Chairman Patrick Leahy Senate Committee on the Judiciary 226 Dirksen Senate Office Building Washington, D.C. 20510

Dear Chairman Leahy:

We are writing to you to bring to your attention actions taken by the United States Patent and Trademark Office (Patent Office) against BlackLight Power, Inc. In our opinion, if the allegations that are set forth in the accompanying documents are true, they raise questions about the conduct of some representatives of the Patent Office.

This issue was first brought to our attention over the last year and a half when BlackLight Power, Inc. contacted each of us regarding the Patent Office's withdrawal from issue of five BlackLight patent applications is apparently based on a revolutionary hydrogen chemistry that had been previously allowed after thorough examination. BlackLight's energy production technology is based on a novel catalytic process that releases large quantities of heat energy from hydrogen. This technology, which was invented by BlackLight's President and CEO, Dr. Randall L. Mills, and has been the subject of scientific studies conducted by over twenty independent laboratories and universities, may reduce U.S. dependence on foreign oil and eliminate environmental concerns.

We have each written to the Patent Office for information about the facts or circumstances surrounding its consideration of the issuance of an earlier application as a patent to BlackLight (the '935 patent) that led to the subsequent withdrawal of BlackLight's patent application. However, the Patent Office has denied our requests for information because of its ongoing litigation with BlackLight.

It is important that the Patent Office not only maintain the confidentiality of patent applications but also conduct itself with the utmost integrity and candor during the entire application process. Consistent with established rules and regulations it is requested that the United States Senate Committee on the Judiciary review this matter. We are enclosing background materials and other supporting documentation to assist you. Thank you for your assistance with this matter.

Sincerely,

United States Senator

United States Senator

Non Wyde

Enclosures

United States Senate

WASHINGTON, DC 20510

December 20, 2001

The Honorable Donald L. Evans
Secretary of the U.S. Department of Commerce
14th Street and Constitution Avenue, N.W.
Suite 5854
Washington, D.C. 20230

Dear Secretary Evans,

We are writing to you to bring to your attention actions taken by the United States Patent and Trademark Office (Patent Office) against BlackLight Power, Inc. In our opinions, if the allegations that are set forth in the accompanying documents are true, they raise questions about the conduct of some representatives of the Patent Office.

This issue was first brought to our attention over the last year and a half when BlackLight Power, Inc. contacted each of us regarding the Patent Office's withdrawal from issue of five BlackLight patent applications which are apparently based on a revolutionary hydrogen chemistry that had been previously allowed after thorough examination. BlackLight's energy production technology is apparently based on a novel catalytic process that releases large quantities of heat energy from hydrogen. This pioneering technology, which was invented by BlackLight's President and CEO, Dr. Randall L. Mills, and has been the subject of scientific studies conducted by over twenty independent laboratories and universities, may reduce U.S. dependence on foreign oil and eliminate environmental concerns.

We have each written to the Patent Office for information about the facts or circumstances surrounding its consideration of the issuance of an earlier application as a patent to BlackLight (the '935 patent) that led to the subsequent withdrawal of BlackLight's patent application. However, the Patent Office has denied our requests for information because of its ongoing litigation with BlackLight. We also urge that the Patent Office establish communications with BlackLight in order to expedite the resolution of this matter.

It is critically important that the Patent Office not only maintain the confidentiality of patent applications but also conduct itself with the utmost integrity and candor during the entire patent application process. It is requested that the U.S. Department of Commerce review this matter, consistent with established rules and regulations, and we are enclosing background materials and other supporting documentation to assist you. Thank you for your assistance with this matter.

Sincerely,

Max Cleland

United States Senator

Non Wyden

Ron Wyden

United States Senator

Enclosures

United States Senate

WASHINGTON, DC 20510

December 21, 2001

The Honorable Donald L. Evans
Secretary
Department of Commerce
14th Street and Constitution Avenue, N.W.
Suite 5854
Washington, D.C. 20230

Dear Secretary Evans:

We have been contacted regarding an ongoing dispute between BlackLight Power, Inc. and the U.S. Patent and Trademark Office. We ask for your assistance in reviewing this matter.

BlackLight Power is concerned about the rejection of five patent applications it submitted to the Patent and Trademark Office. According to the company, the applications were rejected despite the fact that BlackLight followed all applicable rules and procedures and the applications were initially approved by Patent Office examiners. BlackLight believes that the rejection of its applications was groundless and that the decision-making process was not fair and impartial.

We ask that your office review this matter to ensure that BlackLight's applications were reviewed in a fair manner consistent with the review of all patent applications.

Sincerely,

V. CORZINE

ROBERT G. TORRICELLI



Hotmail® simenauerlaw@hotmail.com

Inbox | Previous Page

From: "Liu, Ted" < Ted.Liu@mail.house.gov>

To: "Jeffrey Simenauer" <simenauerlaw@hotmail.com>

Subject: RE: Interview Summary

Date: Thu, 13 Feb 2003 18:05:02 -0500

just got your summary

----Original Message----

From: Jeffrey Simenauer [mailto:simenauerlaw@hotmail.com]

Sent: Thursday, February 13, 2003 6:05 PM

To: Liu, Ted

Subject: Interview Summary

Ted,

Thanks again for your help in investigating PTO abuses against BlackLight Power and for accompanying us to the Patent Office for the Interview on Tuesday.

As you requested, I am forwarding to you a list of bullet points that summarize the two-hour Interview. Please review them carefully when you have time. If your recollection differs from mine, or you would like to add

any other significant points, please let me know and I will make the appropriate changes.

Also, when you are satisfied with the document, please forward it to Jeffrey

Michels in Senator Wyden's office. The Senator wanted a full report on what

took place at the Interview and I think it will be an eye-opener.

Look forward to speaking with you soon, Jeff

Law Offices Of Jeffrey A. Simenauer 2000 M Street, N.W., Suite 700 Washington, D.C. 20036-3307

Tel.: (202) 261-1001 (202) 261-1002

e-mail: simenauerlaw@hotmail.com

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simenauerlaw@hotmail.com

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From: "Liu, Ted" <Ted.Liu@mail.house.gov>

To: "simenauerlaw@hotmail.com" <simenauerlaw@hotmail.com>

Subject: summary

Date: Fri, 14 Feb 2003 11:20:09 -0500 Attachments: InterviewSummary.fin.doc (85k)

Jeff,

Here's my initial reaction to the summary. It's all good except for a small part of paragraph 3. If I see anything else I'll let you know. Thanks for putting it together so quickly.

<<InterviewSummary.fin.doc>>

SUMMARY OF DISCUSSIONS HELD AT THE U.S. PATENT OFFICE ON FEBRUARY 11, 2003 REGARDING BLACKLIGHT POWER PATENT APPLICATIONS

- The following bullet points summarize the discussions that took place on February 11, 2003, between representatives of BlackLight Power, Inc. ("BlackLight" or "BLP") and the U.S. Patent and Trademark Office ("PTO" or "Patent Office"). These discussions included a formal Interview regarding the patentability of pending BlackLight patent applications relating to novel hydrogen technology.
- Attending the Interview on behalf of BLP were the Applicant Dr. Randell L. Mills, his counsel Jeffrey S. Melcher and Jeffrey A. Simenauer, and BLP Director Dr. Shelby Brewer. Attending the Interview on behalf of the Patent Office were Quality Assurance Specialist Douglas McGinty, who lead the Interview, Primary Examiners Wayne Langel, Stephen Kalafut, and William Wayner, and Supervisory Primary Examiners Patrick Ryan and Stanley Silverman (referred to collectively as "the Examiners"). Also attending the Interview as an observer was Ted C. Liu, Senior Legislative Assistant for Congressman David Wu, who represents the 1st District of Oregon.
- Prior to the Interview, Mr. Liu spoke by telephone with Congressional Affairs Specialist Talis Dzenitis in the PTO's Legislative and International Affairs Office to discuss his reasons for attending the Interview. Mr. Liu explained to Specialist Dzenitis that a constituent associated with BLP had contacted Congressman Wu complaining of irregular procedures the PTO has been using in connection with the company's pending patent applications. The procedures complained of included the PTO's withdrawal of five applications approved by Examiners Langel and Kalafut for issuance as patents and the subsequent rejection of those and other BLP applications, and the use of a "secret commit" to determine the patentability of BLP's products. Specifically, BLP representatives expressed concern over the role that certain competitors—the American Physical Society (APS) and its spokesman, Dr. Robert Park, in particular—may have had in influencing a secret PTO committee charged with evaluating and rejecting BLP's pending applications. Specialist Dzenitis informed Mr. Liu that no such "secret committee" exists at the Patent Office.
- Following the formal phase of the Interview, Mr. Liu, Dr. Mills, and his counsel had extended discussions with Examiner Langel. During those discussions, Examiner Langel denied authoring the substantive Office Actions rejecting BLP's patent applications, even though those Actions bear his signature. Langel was the Examiner who, with over 28 years of experience, originally issued Notices of Allowance in three of BLP's withdrawn patent applications. During the extended discussion, he reaffirmed his view that BLP is entitled to patents on its novel hydrogen technology and that he wanted to issue those patents. Examiner Langel then explained, however, that there were other individuals with higher authority who were responsible for drafting the substantive Office Actions he signed and for ultimately deciding whether to issue BLP its patents.
- Examiner Langel reported that he did not know the identity of those individuals, except for one Examiner, Vasu Jagannathan, whom he described as someone who "had something to do with the Office Actions." That observation was confirmed in a PTO letter addressed to Applicant's counsel, dated February 12, 2001, identifying Examiner Jagannathan as someone who was "directly involved in the creation of the Office Action [filed in App'n Ser. No. 09/009294]." In view of Examiner Jagannathan's involvement, Applicant's counsel requested several times that the Examiner appear at the February 11 Interview so that any remaining concerns he may have over the patentability of

Applicant's novel hydrogen technology could be addressed. That request was denied and Examiner Jagannathan did not attend the Interview.

- Applicant and his counsel have been seeking information relating to the identify of all PTO personnel and outside parties who have reviewed, contributed, or otherwise been involved in, or consulted on, the creation of the substantive Office Actions rejecting BLP's pending patent applications. These Office Actions are exemplified by the September 1, 2000 Office Action and attached 9-page Appendix (Paper No. 27) and the July 3, 2001 Final Office Action with the 68-page "Attachment to Response to Applicants' Arguments" (Paper No. 34), both entered in U.S. Serial No. 09/009,294. The PTO has not only denied Applicant this information, but has also denied it to five current and former U.S. Senators—Ron Wyden, Gordon Smith, Jon Corzine, Robert Torricelli, and Max Cleland. Nor has the PTO provided any information relating to those individuals within and outside the Patent Office who might have played a role in the withdrawal from issue of BLP's five allowed patent applications. To avoid further confrontation, Applicant's counsel did not raise these issues at the present Interview, but are still seeking the requested information, which is germane to the prosecution of BLP's pending applications.
- Dr. Mills began the Interview with a general discussion of his novel hydrogen technology and a presentation of experimental evidence confirming its operability. Specifically, Dr. Mills explained how independent laboratory studies, including those conducted at Los Alamos and NASA, and other highly reliable scientific data demonstrated the existence of lower-energy states of hydrogen underlying his technology. During that presentation, the Examiners—with the exception of Examiner Langel—raised theoretical arguments why lower-energy hydrogen could not exist, but did not analyze or otherwise address to any significant degree the specific scientific data presented proving its existence. Instead, the Examiners raised general criticisms regarding the alleged unreliability of that data, which they believe justified according it little or no weight.
- Among the criticisms raised was Examiner Wayner's reference to other inventions that have been the subject of much ridicule, such as perpetual motion energy devices, cold fusion technology, and 100-miles-per-gallon carburetors. Examiner Wayner compared those technologies to BLP's novel hydrogen chemistry by asking the question: "How is your invention any different?" Applicant responded by pointing out the significant differences between those technologies. Unlike the nonsensical inventions mentioned by Examiner Wayner, Dr. Mills explained that he has a working prototype energy cell in operation and has actually produced novel chemical compounds based on his lower-energy hydrogen technology. Dr. Mills also has submitted a substantial body of corroborating experimental evidence that demonstrates the existence of lower energy states of hydrogen, which the PTO has to this day essentially ignored.
- Examiner Wayner then questioned why, if BLP's technology was such an important discovery, the company had not yet developed a commercial device for producing energy. Applicant noted the high costs associated with developing a commercial product and explained that BLP was looking to license patents for its technology to commercial businesses—assuming those patents are ever issued. Applicant's counsel then asked Examiner Wayner whether he was introducing a new patentability standard requiring BLP to produce a commercial device before he would allow a patent to issue. Examiner Wayner denied that was the case and, in response to a specific question from Mr. Liu, affirmed that indeed an Applicant does not need to prove commercial applicability to secure a patent for his invention.

- Examiner Wayner further questioned why BLP had so many detractors, specifically naming Dr. Robert Park, spokesman for Applicant's main competitor, the APS. Applicant was astonished by the Examiner's reference to Dr. Park, since he is the APS lobbyist Applicant has identified to the PTO as having a "Deep Throat" PTO contact with access to confidential information. Applicant's counsel tried raising the issue of Dr. Park's agenda and obvious motives for criticizing BLP's competing technology, namely that the APS lobbies Congress for, and ultimately receives, hundreds of millions of dollars in government funding for its pet projects. Specialist McGinty refused to discuss the matter and suggested that BLP has a "similar agenda," noting BLP's contract with NASA. Applicant corrected the Examiner, explaining that BLP does not receive any government funding for its research. Specialist McGinty had no response.
- Examiner Wayner then raised questions regarding the integrity of the scientific evidence presented by Dr. Mills. Included in that evidence was spectroscopic data, which counsel explained is tantamount to a "chemical fingerprint." Counsel further noted that even Dr. Robert Park—whom Examiner Wayner identified as BLP's chief antagonist—has proclaimed the reliability of spectroscopic data. Indeed, in a published article that the PTO has used to reject BLP's applications, Park had this to say about the reliability of spectral data:

The energy states of atoms are studied through their atomic spectra—light emitted at very specific wavelengths when electrons make a jump from one energy level to another. The exact prediction of the hydrogen spectrum was one of the first great triumphs of quantum theory; it is the platform on which our entire understanding of atomic physics is built. The theory accounts perfectly for every spectral line.

There is no line corresponding to a "hydrino" state. Indeed there is no credible evidence at all to support Mills' claim. [The Washington Post, January 12, 2000]

- Yet when Dr. Mills tried to present this highly reliable data showing the spectral lines corresponding to a lower-energy hydrogen, *i.e.*, "hydrino," state, Examiner Wayner stated that "spectroscopic lines are meaningless" and "don't mean a hill of beans" to him.
- Specialist McGinty and Examiner Wayner then questioned Applicant about how one would know whether his scientific test data confirming the existence of lower energy states for hydrogen is accurate. Applicant responded by noting that the test data was conducted by highly qualified Ph.D. chemists, many of them representing independent laboratories. Applicant further noted that the data—which has cost BLP tens of millions of dollars to produce—has now been extensively peerreviewed in over 50 published, or soon to be published, articles appearing in prestigious scientific journals. Among the journals specifically mentioned at the Interview were: *Journal of Applied Physics* and *Journal of Molecular Structure*.
- Applicant was shocked by the refusal of Specialist McGinty and Examiner Wayner to accept as
 reliable the scientific data appearing in these published journal articles. Applicant's counsel
 reminded the Examiners of a previous Interview held February 21, 2001, during which Applicant
 also presented experimental evidence of lower energy states of hydrogen. Counsel recalled how
 Examiner Jagannathan who led that Interview—but refused to show up to this one—advised Dr.

Mills that he would give serious consideration to evidence of lower-energy hydrogen only if it was submitted in articles for peer review and published in scientific journals.

- Applicant's counsel noted that, even though the PTO has never provided any legal authority for
 imposing a newly minted patentability standard requiring the publication of test data in peerreviewed journal articles, Applicant nonetheless accepted Examiner Jagannathan's requirement.
 Counsel further noted that with now over 50 such articles—and another 30 on the way—Applicant
 has far exceeded the patentability standards improperly set by the Patent Office.
- Having met those inflated standards, Applicant's counsel expressed frustration that the PTO still
 refuses to seriously consider and analyze the scientific data published in the required journal articles.
 Specialist McGinty and Examiner Wayner indicated that they were not qualified to evaluate that
 data. When asked who was responsible for evaluating the data, Specialist McGinty stated it was the
 other Examiners of record, Langel and Kalafut.
- Specialist McGinty also asked what assurances Applicant could provide that the published data was
 actually peer reviewed. Applicant could only state what is a known fact—that to get scientific data
 published in a journal article, it must first go through a rigorous peer-review process.
- Applicant's counsel then raised the issue of changing standards for patentability that the PTO has continually imposed on Applicant through the examination process. For instance, Counsel specifically mentioned prior Office Actions claiming that Applicant's lower-energy hydrogen technology violates "physical laws" without identifying which such laws were supposedly being violated, and then requiring Applicant to prove otherwise. Counsel also read from a recent Office Action dismissing Applicant's scientific data out of hand for failing to prove the invalidity of quantum theory:

The request for reconsideration has been entered and considered but does not overcome the rejection . . . because there is no evidence presented which would prove applicant's contention that the theory of quantum mechanics is invalid." [October 7, 2002 Office Action entered in U.S. Serial No. 09/110,717]

- Counsel also mentioned that when Applicant recently submitted additional peer-reviewed journal articles offering further proof of lower-energy states of hydrogen—in accordance with the standards imposed by Examiner Jagannathan—the author(s) of a recent Office Action criticized that submission as being merely "cumulative."
- Expressing frustration over the PTO's lack of consistent patentability standards to guide Applicant, his counsel requested that Specialist McGinty provide such guidance. Specialist McGinty again raised his concern over the integrity of the experimental evidence and indicated that he would be more receptive to that evidence if it was validated by independent third parties. Applicant explained to Specialist McGinty that evidence dating back over four years includes independent third-party verification, to which the Specialist had no response. Applicant's counsel also pointed out that Specialist McGinty's unfounded concern over the lack of such verification demonstrates the PTO's obvious failure to have reviewed and analyzed the data in any detail.

- Applicant's experimental evidence as a whole by referring numerous times to the high-power plasma data. Applicant repeatedly pointed out to him that the plasma data was but a small fraction of the submitted data and that it was presented primarily to provide additional support for BLP's plasma-related applications. Most of the other scientific data submitted relates to a broad range of analytical studies demonstrating that lower energy states of hydrogen exist. For example, regarding those applications relating to novel chemical compounds, Applicant pointed Specialist McGinty to the extensive spectroscopic data supporting the identification of those compounds, but he apparently did not understand the significance of that data. For example, Specialist McGinty stated that the NMR data confirming lower-energy hydrogen could have been due to nitrogen. As Applicant explained, however, as a matter of basic chemistry, that NMR data only shows protons and no other element but hydrogen is in the data range.
- In response to Specialist McGinty's reservations over issuing Applicant his patents, Applicant's counsel raised questions regarding who had the ultimate authority to make that decision. Counsel expressed concern that the pending applications were being examined in secret and that without knowing who had the authority to issue the patents, Applicant was unfairly being denied the opportunity to present his case to the decision-maker. Specialist McGinty stated in no uncertain terms that Examiners Langel, Kalafut, and Wayner, as the signatories of the Office Actions, had "full authority" to prosecute the pending applications and to issue Applicant his patents. Notably, that statement contradicts Examiner Langel's comment following the Interview that other, unknown individuals have that authority, for if he did, Applicant already would have been granted his patents.
- Upon hearing Specialist McGinty's statement, Applicant's counsel immediately turned to Examiner Langel and asked him point blank whether, after studying the experimental evidence of record, he still believes that BlackLight's patent applications were allowable. The Examiner replied, "Yes, they're still allowable." Counsel then asked Examiner Langel whether, following the Interview, he was prepared to allow the claims and issue BlackLight its patents in those applications assigned to him, to which the Examiner replied, "fine with me."
- Specialist McGinty expressed immediate discomfort in agreeing to allow any claims at the Interview. Specifically, he raised a concern that even if the PTO ultimately found Applicant's claimed technology to be operable, there were still issues of novelty and nonobviousness to be addressed. Applicant's counsel expressed surprise by that statement given that the PTO has taken the position for years that Applicant's inventions are inoperable and that lower-energy hydrogen cannot possibly exist. Counsel pointed out the obvious contradiction in Specialist McGinty's statement that the PTO may now still need to conduct a search to see if lower-energy hydrogen does in fact exist.
- Applicant's counsel further recalled his own personal experience as an Examiner and the PTO's examination guidelines in effect at that time. When examining an application, the Examiner was expected to evaluate not only the operability of the claimed invention, but also, at the same time, the novelty and nonobviousness of that invention. Counsel again turned to Examiner Langel to confirm that this was his understanding. He replied that it was and, in fact, stated that the first thing he did was to conduct a thorough prior art search to see if he could "knock out" BLP's applications in the easiest way possible. Examiner Langel confirmed that he was unable to do so since the result of that

search turned up no applicable prior art, which is why he originally allowed the BLP applications assigned to him.

- Applicant's counsel acknowledged Specialist McGinty's position and tried by reassure him that they would work with him to alleviate any remaining concerns he might have in issuing BLP its patents. Counsel then specifically asked the Specialist to articulate how Applicant might accomplish that mutually beneficial goal. In response, Specialist McGinty indicated that, in the next Response to the pending Office Actions, Applicant should focus on identifying the experimental data derived by independent third party testing, as opposed to test data derived solely by Applicant.
- Specialist McGinty further expressed concern over whether such test data, even assumed to be reliable, was commensurate with the scope of the claims of the various applications to adequately support patentability. Applicant's counsel restated their belief that the test data did adequately support the claimed subject matter. Counsel, however, recommended that they go through the claims one-by-one with each of the assigned Examiners to see if some agreement can be reached as to those claims that are adequately supported and for which patents can be issued. As for the remaining claims that the PTO believes are not adequately supported by the scientific data, Applicant would not be prejudiced in continuing to seek broad claim coverage through continued prosecution. Specialist McGinty agreed that this sounded like a reasonable way to proceed. This understanding was memorialized in the Interview Summary Form as follows:

ATTACHMENT TO INTERVIEW SUMMARY FORM

Applicant requested that the following points discussed at the Interview held on February 11, 2003 be included as an Attachment to the Interview Summary Form.

Applicant's counsel and the Examiners in attendance at the Interview agreed to meet again at a future date, either in person or by telephone, to continue discussions regarding the patentability of Applicant's pending patent applications. Specifically, the Examiners expressed concern that Applicant's experimental evidence be commensurate with the scope of the claims. To address that concern, Applicant's counsel agreed with the Examiners to go through the patent applications claim-by-claim with the Examiners and demonstrate how the scientific data supports those claims.

For those claims that are supported by the data, the PTO agreed to issue those claims. For those claims that the PTO determines are not supported by the data, Applicant will continue to seek that broader claim coverage in subsequent proceedings.

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August/September 2002 ISSUE

SEARCH ARBINEVE

APS E-Board Passes Resolution on Perpetual Motion Machines

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The APS Executive Board approved a resolution at its June 2002 meeting in Annapolis, MD, affirming the fraudulent nature of claims of perpetual motion

The resolution was deemed necessary because of a recent increase in patent applications for such devices. Robert Park, APS Director of Public Information and author of the weekly electronic newsletter "What's New," reported that the US Paten Office has received several patent applications for perpetual motion machines during the first six months of this year alone. [Park's 2000 book, Voodoo Science, devoted considerable space to the phenomenon of such devices throughout history.] The text of the APS resolution follows.

The Executive Board of the American Physical Society is concerned that in this period of unprecedented scientific advance, misguided or fraudulent claims of perpetual motion machines and other sources of unlimited free energy are proliferating. Such devices directly violate the most fundamental laws of nature laws that have guided the scientific progress that is transforming our world.

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